

EXHIBIT 44

CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

1

1 UNITED STATES DISTRICT COURT
 2 DISTRICT OF MINNESOTA
 3 -----
 4 In Re:
 5 Bair Hugger Forced Air Warming
 6 Products Liability Litigation
 7
 8 This Document Relates To:
 9 All Actions MDL No. 15-2666 (JNE/FLM)
 10 -----
 11
 12 DEPOSITION OF KARL D. ZGODA
 13 VOLUME I, PAGES 1 - 238
 14 FEBRUARY 24, 2017
 15
 16
 17 (The following is the deposition of KARL D.
 18 ZGODA, taken pursuant to Notice of Taking Deposition,
 19 via videotape, at the offices of Ciresi Conlin
 20 L.L.P., 225 South 6th Street, Suite 4600, in the City
 21 of Minneapolis, State of Minnesota, commencing at
 22 approximately 9:08 o'clock a.m., February 24, 2017.)
 23
 24
 25

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09:08:25 1 PROCEEDINGS
 09:08:25 2 (Witness sworn.)
 3
 4 KARL D. ZGODA,
 5 Called as a witness, being first
 6 duly sworn, was examined and
 7 testified as follows:
 8 EXAMINATION
 8 BY MR. BANKSTON:
 09:08:39 9 Q. All right, sir. Can you state the name for
 09:08:41 10 the record?
 09:08:41 11 A. Karl Zgoda.
 09:08:42 12 Q. All right. Mr. Zgoda, you understand we're
 09:08:43 13 here today to talk about a medical device made by 3M
 09:08:46 14 known as the Bair Hugger; correct?
 09:08:47 15 A. Correct.
 09:08:48 16 Q. Okay. You've given a couple depositions
 09:08:50 17 before regarding the Bair Hugger.
 09:08:52 18 A. Correct.
 09:08:52 19 Q. Okay. This -- I believe this will be your
 09:08:54 20 third deposition?
 09:08:54 21 A. Yes.
 09:08:55 22 Q. I'm going to go ahead and assume, then,
 09:08:56 23 after going over the ground rules in those depositions and
 09:08:59 24 talking to your lawyers, nothing's unfamiliar about
 09:09:02 25 what's going on today. You understand why you're here

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09:09:05 **1** today.

09:09:05 **2** **A.** Yes.

09:09:06 **3** **Q.** Okay. Now for many years the Bair Hugger

09:09:09 **4** was made by Arizant Healthcare; correct?

09:09:15 **5** **A.** Yes.

09:09:16 **6** **Q.** Later it was -- that company was purchased

09:09:17 **7** by 3M.

09:09:18 **8** **A.** Yes.

09:09:19 **9** **Q.** And at some point before that it actually

09:09:21 **10** had been known as Augustine Medical; correct?

09:09:23 **11** **A.** Correct.

09:09:24 **12** **Q.** Okay. Your employment spanned all three of

09:09:26 **13** those entities.

09:09:27 **14** **A.** Yes.

09:09:28 **15** **Q.** During this deposition there's going to be a

09:09:30 **16** lot of times that I may say generically, "the

09:09:33 **17** company," and unless I directly specifically tell you

09:09:35 **18** otherwise, when I say that, I mean the entire span of

09:09:39 **19** your employment. So if an event happened at Augustine

09:09:43 **20** Medical, or if it happened at Arizant, or if it

09:09:45 **21** happened at 3M, if we're just talking generically when

09:09:47 **22** I say "your time at the company," I'm not going to pay

09:09:50 **23** too much attention to name changes.

09:09:52 **24** **A.** Okay.

09:09:52 **25** **Q.** But if there is some -- some part of your

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09:09:54 **1** answer that you need to tell me that is specific to

09:09:57 **2** one of those entities, please feel free to point that

09:10:00 **3** out to me any time during the deposition.

09:10:02 **4** **A.** Okay.

09:10:03 **5** **Q.** But if it's all right with you, for a lot of

09:10:05 **6** the questions I'm just going to refer to it

09:10:08 **7** generically as "the company."

09:10:09 **8** **A.** Yes.

09:10:09 **9** **Q.** Okay. Now you no longer work for 3M;

09:10:11 **10** correct?

09:10:11 **11** **A.** Correct. I do not.

09:10:13 **12** **Q.** Okay. You left the company about three

09:10:14 **13** years ago?

09:10:15 **14** **A.** Yeah, it would have been November -- a

09:10:16 **15** little bit over two years ago. I believe November of

09:10:18 **16** '15, --

09:10:19 **17** **Q.** Okay.

09:10:21 **18** **A.** -- '14. I've been there two -- a little bit

09:10:22 **19** over two years.

09:10:23 **20** **Q.** Okay. And you're working now for a company

09:10:25 **21** called RespirTech?

09:10:26 **22** **A.** Correct.

09:10:27 **23** **Q.** Now there's some other former Arizant/3M

09:10:29 **24** folks over there as well; right?

09:10:31 **25** **A.** Yes.

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09:10:31 **1** **Q.** And Gary Hansen's over at RespirTech?

09:10:33 **2** **A.** Yes.

09:10:33 **3** **Q.** Bob Buehler would be another one?

09:10:35 **4** **A.** Correct.

09:10:35 **5** **Q.** Is there anybody else from the old team that

09:10:37 **6** went over to RespirTech?

09:10:39 **7** **A.** Oh, yeah. There's a whole bunch of us.

09:10:41 **8** **Q.** How many people do you think made the leap

09:10:42 **9** over to RespirTech?

09:10:44 **10** **A.** Oh, I'm guessing there's between a dozen and

09:10:48 **11** 15 --

09:10:48 **12** **Q.** Okay.

09:10:48 **13** **A.** -- off the top of my head.

09:10:50 **14** **Q.** Does that include engineers who used to work

09:10:51 **15** for you --

09:10:52 **16** **A.** Yes.

09:10:52 **17** **Q.** -- at your time?

09:10:53 **18** **A.** Yes.

09:10:55 **19** **Q.** Now you were given a little bit of advance

09:10:58 **20** notice of this deposition. Have you spent any time

09:11:01 **21** preparing for the deposition?

09:11:02 **22** **A.** Yes.

09:11:03 **23** **Q.** About how much time have you spent preparing

09:11:06 **24** for this deposition?

09:11:07 **25** **A.** Twenty, 25, 30 hours.

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09:11:09 **1** **Q.** Okay. And then you also spent about the

09:11:12 **2** same amount of time, about 20 hours preparing for each

09:11:14 **3** of your prior depositions; correct?

09:11:16 **4** **A.** That's my recollection, yes, in that area.

09:11:19 **5** **Q.** Okay. So all tolled, when going over the

09:11:23 **6** issues in this case, the documents in this case

09:11:25 **7** preparing for these depositions, be fair to say that

09:11:28 **8** you've spent about 60 to 70 hours doing that.

09:11:31 **9** **A.** Yes. I'd say probably 60 to 80. I don't

09:11:34 **10** know the exact number, but in that ballpark, yeah.

09:11:36 **11** **Q.** Okay. Now I realize that some of the events

09:11:38 **12** we're going to be talking about today were a long time

09:11:40 **13** ago, but during that prep -- during that preparation I

09:11:43 **14** take it you reviewed documents from that time period?

09:11:45 **15** **A.** Yes.

09:11:45 **16** **Q.** Okay. Do you feel comfortable talking about

09:11:48 **17** those issues today?

09:11:50 **18** **A.** Yes.

09:11:51 **19** **Q.** And let me clarify what I mean by that, by

09:11:53 **20** "these issues."

09:11:53 **21** **A.** Yeah.

09:11:54 **22** **Q.** You feel comfortable about talking about the

09:11:56 **23** development of the Model 750 that you were a part of?

09:11:59 **24** **A.** Yes.

09:11:59 **25** **Q.** Okay. Now you were hired as a design

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09:12:03 **1** engineer back about 1997; correct?

09:12:05 **2** **A.** April of '97, yes.

09:12:07 **3** **Q.** Okay. And you were the project lead on the

09:12:10 **4** development of the Bair Hugger Model 750.

09:12:12 **5** **A.** Yes.

09:12:15 **6** **Q.** In that your responsibility was ultimately

09:12:18 **7** to develop the product and get it to market.

09:12:20 **8** **A.** I'd say that's accurate, yes.

09:12:23 **9** **Q.** Okay. You would be the high-level person

09:12:27 **10** responsible for making sure the product was safe and

09:12:30 **11** that the necessary verification testing had been done.

09:12:36 **12** MR. GOSS: Object to form.

09:12:37 **13** **A.** I would say I was responsible for making

09:12:39 **14** sure all of the tasks/requirements of the product

09:12:44 **15** development system were met, and so -- I mean I was

09:12:48 **16** ultimately responsible for making sure all the boxes

09:12:50 **17** were checked as far as what we needed to do to launch

09:12:53 **18** the product. I may not have been specifically

09:12:55 **19** responsible for those individual tasks but, you know,

09:12:58 **20** I had to make sure that we did everything we were

09:13:01 **21** supposed to do.

09:13:01 **22** **Q.** Okay. You remember giving a deposition in

09:13:05 **23** the case Timothy Johnson versus 3M, that was your most

09:13:09 **24** recent deposition?

09:13:09 **25** **A.** Yes.

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09:13:10 **1** **Q.** Okay. And the reason I ask you this

09:13:11 **2** question today is because during that deposition do

09:13:14 **3** you remember saying that you were the person who was

09:13:15 **4** responsible for making sure that the product was safe

09:13:17 **5** and effective and that the necessary verification

09:13:20 **6** testing had been done?

09:13:21 **7** **A.** I don't recall explicitly saying that, but

09:13:23 **8** if that's what the -- the transcript shows.

09:13:27 **9** **Q.** Okay. And then -- And you would agree with

09:13:29 **10** me that's generally consistent with what you're

09:13:31 **11** telling me today.

09:13:31 **12** **A.** Yeah, I believe so. Yeah.

09:13:33 **13** **Q.** Okay. So if I'm trying to drill down and

09:13:35 **14** find the person who's responsible for making sure,

09:13:38 **15** during the development period, that the product's safe

09:13:40 **16** and effective and that the necessary verification

09:13:42 **17** testing had been done, you're a person I can talk to

09:13:45 **18** about that.

09:13:47 **19** **A.** I would say you can talk to me about that,

09:13:49 **20** but once again other individuals may have been

09:13:51 **21** explicitly responsible for making sure the

09:13:53 **22** verification testing was done, that the safety

09:13:56 **23** requirements were met. But I was, you know,

09:13:57 **24** responsible for making sure that they had done their

09:14:01 **25** jobs and all the boxes were checked. I don't know if

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09:14:04 **1** it's different semantics or not, but.

09:14:06 **2** **Q.** Sure. And in fact I want to get away from

09:14:10 **3** that kind of semantics. I want to show you the

09:14:11 **4** transcript. Let's --

09:14:11 **5** **A.** Okay.

09:14:12 **6** **Q.** -- do a little bit of refreshing here. And

09:14:14 **7** I'm actually -- I'm gonna go ahead and give it to you.

09:14:22 **8** And I'm going to hand you your deposition

09:14:23 **9** here open to page 47.

09:14:25 **10** **A.** Okay.

09:14:26 **11** **Q.** Okay. And I want to review a question and

09:14:27 **12** answer with you.

09:14:29 **13** Do you see there at page 47, and then you

09:14:32 **14** see at line 20 there is a question, who is the high

09:14:36 **15** level -- who is "the higher level person responsible

09:14:39 **16** to make sure that the required tests were done on the

09:14:42 **17** 750 to make sure it's safe?"

09:14:44 **18** And your answer was --

09:14:45 **19** **A.** Page -- I'm sorry? Page 47, line 20?

09:14:48 **20** **Q.** Twenty.

09:14:50 **21** Are you finding that question?

09:14:51 **22** **A.** That was my response, but that's not -- Oh,

09:14:54 **23** it's a question.

09:14:56 **24** **Q.** Take a minute to just look at the

09:14:58 **25** transcript, --

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09:14:58 **1** **A.** Yeah. Let me read it, please.

09:15:01 **2** **Q.** -- get yourself familiar with it. Right.

09:15:03 **3** **A.** (Witness reviewing document.) Okay.

09:15:15 **4** **Q.** So in this question you were asked who is

09:15:18 **5** the higher level person responsible to make sure the

09:15:20 **6** required tests were done on the 750 to make sure it's

09:15:23 **7** safe. And your answer was: "As the project lead, I'd

09:15:27 **8** be responsible for making sure...the product was safe

09:15:30 **9** and effective and the necessary verification testing

09:15:33 **10** was being done."

09:15:34 **11** Do you stand by that testimony today?

09:15:36 **12** **A.** Yeah. I'd say that's accurate.

09:15:39 **13** **Q.** And you know --

09:15:40 **14** And part of the reason I'm asking you is

09:15:41 **15** I've obviously deposed a lot of employees in this

09:15:44 **16** case --

09:15:44 **17** **A.** Umm-hmm.

09:15:44 **18** **Q.** -- and I've been trying to find the person

09:15:48 **19** who's consistent with this testimony that the

09:15:49 **20** necessary verification testing had been done. And

09:15:52 **21** everyone keeps pointing to project lead and your

09:15:53 **22** engineering department.

09:15:53 **23** **A.** Okay.

09:15:54 **24** **Q.** So would you agree with me that when it

09:15:56 **25** comes to verification, that's your department's -- in

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09:15:58 **1** other words that has nothing to do with the legal
 09:16:00 **2** department, human resources. That's an engineering
 09:16:02 **3** issue.
 09:16:03 **4** MR. GOSS: Object to the preamble.
 09:16:05 **5** MR. BREWER: I'm going to object to the
 09:16:06 **6** form. I think it assumes facts that have not been
 09:16:09 **7** established.
 09:16:10 **8** MR. BANKSTON: The form's fine.
 09:16:12 **9** MR. BREWER: And it's compound.
 09:16:14 **10** **Q.** And you can --
 09:16:15 **11** If your attorneys haven't let you know, I'll
 09:16:17 **12** go ahead and let you understand. When objections are
 09:16:19 **13** made, there's not a judge here to rule on them,
 09:16:22 **14** that'll have to be done later. So unless your
 09:16:24 **15** attorney specifically says, "I do not want you to
 09:16:26 **16** answer that question," after an objection you can go
 09:16:28 **17** ahead and answer.
 09:16:29 **18** **A.** So I would say that the R&D group would
 09:16:36 **19** perform the required verification testing to make sure
 09:16:38 **20** that the product met its design inputs and its
 09:16:41 **21** requirements, and as the project lead I would have to
 09:16:44 **22** make sure that those tests were done.
 09:16:46 **23** **Q.** Okay. And in looking up the chain of
 09:16:48 **24** accountability, I guess, when you mention research and
 09:16:50 **25** development, --

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09:16:50 **1** **A.** Yeah?
 09:16:51 **2** **Q.** -- does that mean that during this period of
 09:16:53 **3** time Gary Hansen would have been your superior?
 09:16:55 **4** **A.** During the development? No, I don't believe
 09:16:57 **5** he was an employee at that time.
 09:16:58 **6** **Q.** Okay.
 09:16:59 **7** **A.** It would have been Gary Maharaj.
 09:17:01 **8** **Q.** Would have been your direct --
 09:17:02 **9** The first next direct supervisor to you --
 09:17:05 **10** **A.** Umm-hmm.
 09:17:05 **11** **Q.** -- would have been Mr. Maharaj?
 09:17:06 **12** And then would I be correct then that Mr.
 09:17:09 **13** Maharaj, as director of R&D, would report to the CEO?
 09:17:13 **14** **A.** I'm not certain what Mr. Maharaj's title
 09:17:16 **15** was, but I think he was VP of R&D or something along
 09:17:20 **16** those lines. But yeah, I believe he reported to the
 09:17:22 **17** CEO at the time.
 09:17:23 **18** **Q.** Okay. Now I want to talk to you today about
 09:17:26 **19** the 750 development efforts.
 09:17:28 **20** **A.** Umm-hmm.
 09:17:28 **21** **Q.** And as we discussed, that's something you've
 09:17:31 **22** been preparing with attorneys to talk about; correct?
 09:17:33 **23** **A.** Correct.
 09:17:34 **24** **Q.** Okay. Now when we talk about this job of
 09:17:38 **25** necessary verification testing, making sure the

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09:17:40 **1** product's safe, you'll agree with me it's a crucial
 09:17:43 **2** function to perform verification testing and safety
 09:17:46 **3** testing. That's a crucial function of medical device
 09:17:50 **4** design.
 09:17:51 **5** **A.** It is a design requirement, yes.
 09:17:52 **6** **Q.** Okay. It's crucial that you test and that
 09:17:55 **7** you validate changes in the product that could affect
 09:17:58 **8** patient safety.
 09:18:01 **9** **A.** Verify and validate, yes.
 09:18:03 **10** **Q.** Okay. It would be necessary to test and
 09:18:06 **11** validate any changes in the product that could impact
 09:18:10 **12** any of the safety assurances made in the company's
 09:18:12 **13** government filings.
 09:18:14 **14** **A.** Yes.
 09:18:15 **15** **Q.** Okay. Now when you were in the 750
 09:18:18 **16** development process you understood that that product
 09:18:20 **17** would be used in different kinds of surgeries.
 09:18:24 **18** **A.** Yes.
 09:18:26 **19** **Q.** In other words, when designing the 750 you
 09:18:27 **20** did not set out to design it for one particular type
 09:18:30 **21** of surgery.
 09:18:32 **22** **A.** Correct.
 09:18:32 **23** **Q.** Okay. So during that design process you
 09:18:36 **24** would have to consider different surgeries and their
 09:18:38 **25** unique demands and their unique risks; correct?

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09:18:50 **1** **A.** Since we were in the --
 09:18:51 **2** Since the mode of therapy was a heat
 09:18:54 **3** transfer, delivering heat to the patient, and that
 09:18:57 **4** seems to be kind of independent of surgery type, I'm
 09:19:03 **5** not sure I'd agree with the assessment that we drilled
 09:19:07 **6** down to that level of differentiation between the
 09:19:10 **7** surgeries. It was, you know, for people undergoing
 09:19:13 **8** anesthesia who couldn't thermoregulate their own body
 09:19:15 **9** and we needed to apply patient -- or heat to the
 09:19:17 **10** patient to keep them warm.
 09:19:19 **11** **Q.** Okay.
 09:19:20 **12** **A.** So I don't think we differentiated between
 09:19:23 **13** the actual --
 09:19:23 **14** **Q.** Well for instance --
 09:19:23 **15** **A.** -- procedures in the requirements.
 09:19:24 **16** **Q.** Sure. Okay.
 09:19:26 **17** For instance, you understand, sitting here
 09:19:27 **18** today, that -- that orthopedic surgery -- orthopedic
 09:19:31 **19** implant surgery is very sensitive to infection.
 09:19:36 **20** **A.** Yes.
 09:19:37 **21** **Q.** During the design process of the Model 750
 09:19:39 **22** the company understood that; correct?
 09:19:43 **23** **A.** I would say at least certain segments of the
 09:19:46 **24** company understood that. Maybe not universally by
 09:19:50 **25** everyone.

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09:21:51 1 I know it was being -- it was being built and sold
09:21:54 2 when I started.
09:21:56 3 Q. And so one of the things you would have
09:21:58 4 access to is the company's prior knowledge, testing,
09:22:03 5 documents relating to the 505. That's something that
09:22:07 6 was available to you when you were designing the 750.
09:22:08 7 A. Yes.
09:22:10 8 Q. Okay. I want to show you one of those
09:22:11 9 documents.
09:22:15 10 MR. BAXSTON: Would you get tab 1 out for
09:22:15 11 everybody?
09:22:20 12 [REDACTED]

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09:22:55 **1**

Q.

09:23:27 **16** you see the number 1 there?

09:23:29 **A.** Yes.

09:23:29 **18** **Q.** Okay. So it states: "Contamination.

09:23:33 **19** Airborne contamination from air blown intraoperatively

09:23:36 **20** across the surgical wound may result in airborne

09:23:39 **21** contamination."

09:23:40 **22** In other words, this is a potential concern

09:23:42 **23** that needs to be mitigated in the design of the unit;

09:23:44 **24** correct?

09:23:50 **25** **A.** Can you rephrase that?

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[illegible]

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[illegible]

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09:29:41 **1** changes that could impact any of the safety assurances
09:29:45 **2** made in the company's government filings.
09:29:46 **3** You don't disagree with that; right?
09:29:51 **4** **A.** I would say I don't disagree with that.
09:29:53 **5** **Q.** Right. So if these --
09:29:55 **6** In order to find out if the safety claims
09:29:57 **7** have changed, it's necessary for you, the lead
09:30:01 **8** developer of the Model 750, to know what the safety
09:30:04 **9** claims were; right?
09:30:05 **10** MR. GOSS: Object to form.
09:30:08 **11** **A.** I would say it's the company's
09:30:12 **12** responsibility to know that, but maybe not exclusively
09:30:15 **13** the project lead.
09:30:17 **14** **Q.** Well how are you going to make sure that the
09:30:19 **15** right validation has been done and the safety testing
09:30:22 **16** has been done if you don't know if there's been
09:30:25 **17** changes that impacted the safety claims?
09:30:28 **18** **A.** You rely on the expertise and experience of
09:30:30 **19** the people on the development team.
09:30:32 **20** **Q.** Okay. So in other words, somebody on your
09:30:33 **21** development team told you whether or not any changes
09:30:37 **22** might impact the statements being made in this
09:30:39 **23** document.
09:30:42 **24** **A.** Ask that one more time.
09:30:43 **25** **Q.** Somebody on your development team told you

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09:30:46 1 whether or not things being done in the Model 750
09:30:50 2 could impact the statements being made in that
09:30:52 3 document.

09:30:56 4 A. I would say that's not accurate. This --
09:30:58 5 This summary or document I don't recall being a
09:31:01 6 specific discussion point during the development
09:31:03 7 effort.

09:31:04 8 Q. So let's make sure I understand this
09:31:05 9 perfectly clear.

09:31:06 10 A. Yeah.

09:31:06 11 Q. During the Model 750 development, nobody
09:31:09 12 made you aware of what the safety claims actually were
09:31:11 13 on the Model 505.

09:31:12 14 MR. GOSS: Object to form.

09:31:13 15 MR. BREWER: Objection, form.

09:31:15 16 A. Nobody made me aware of the 510(k) filing
09:31:18 17 summary for the 505. I do not -- I do not recall
09:31:20 18 anybody doing that.

09:31:22 19 Q. Okay. Now one of the goals of the 750
09:31:26 20 project was a higher volume of airflow.

09:31:30 21 A. Correct. The -- The goal was to have a
09:31:32 22 higher heat transfer rate, and the way to achieve that
09:31:35 23 while maintaining safe temperatures was a higher
09:31:37 24 airflow rate.

09:31:38 25 Q. It's about double what the 505 is?

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[illegible]

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09:34:09 1 [REDACTED]
[REDACTED] 2 [REDACTED]
[REDACTED] 3 [REDACTED]
09:34:16 4 Q. Okay. Now after that change had been done,
09:34:21 5 or during the development of the 750 when the airflow
09:34:24 6 had been changed, --
09:34:25 7 A. Yeah.
09:34:25 8 Q. -- okay? During that development period you
09:34:27 9 will agree with me there was no testing with respect
09:34:32 10 to the effect on the operating room air environment.
09:34:38 11 A. I would qualify your comment by saying that
09:34:41 12 I am not personally aware of any testing that was done
09:34:43 13 related to that, but I can't say universally that none
09:34:46 14 was done.
09:34:49 15 Q. Okay. You're the person who's responsible
09:34:53 16 for making sure that testing's done.
09:34:56 17 A. I'm once again responsible for making sure
09:34:58 18 the testing that was identified in the project plan
09:35:00 19 and the test plans was satisfactorily completed, yes.
09:35:03 20 Q. All right. So part of that as product lead
09:35:06 21 is to create a test plan.
09:35:08 22 A. No, not necessarily. I wouldn't say the
09:35:10 23 test plan is the project lead's responsibility. The
09:35:13 24 project lead's responsibility is to make sure that the
09:35:15 25 testing that was identified by the development team

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09:35:18 **1** was satisfactorily executed and there were test
 09:35:22 **2** reports showing the results of the tests.
 09:35:23 **3** **Q.** And in that test plan and those results did
 09:35:26 **4** not include any testing with respect to the unit's
 09:35:29 **5** effect on the operating room air environment.
 09:35:31 **6** **MR. GOSS:** Object to form.
 09:35:33 **7** **MR. BREWER:** Object to the form.
 09:35:34 **8** **A.** I think what I just said was I -- I don't
 09:35:37 **9** recall and I'm not aware personally of any testing
 09:35:39 **10** that was done to test that.
 09:35:42 **11** **Q.** You spent 60 to 70 hours preparing for this
 09:35:44 **12** deposition, and I'm wondering during those 60 to 70
 09:35:47 **13** hours did you not look into whether this unit had ever
 09:35:51 **14** been tested for its effect on operating airflow
 09:35:54 **15** environment?
 09:35:55 **16** **A.** I looked at documents that were provided to
 09:35:56 **17** me by counsel.
 09:35:58 **18** **Q.** Okay. You understand that's not exactly
 09:36:00 **19** what I asked, though; right? I'm not asking you did
 09:36:03 **20** counsel give you documents.
 09:36:04 **21** I'm asking you, during --
 09:36:06 **22** You were spending 60 to 70 hours preparing
 09:36:08 **23** for this case. In fact, let's back up.
 09:36:10 **24** You understand what the fun -- what the
 09:36:11 **25** allegations in this case are by the plaintiffs?
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09:36:14 **1** **A.** Generally, yes.
 09:36:15 **2** **Q.** Okay. And when I -- when you say
 09:36:17 **3** "generally," I'm going to be very general as well.
 09:36:19 **4** **A.** Okay.
 09:36:19 **5** **Q.** You understand that there is an allegation
 09:36:21 **6** in this case that the Model 750 that you were the
 09:36:23 **7** project lead on --
 09:36:24 **8** **A.** Umm-hmm.
 09:36:24 **9** **Q.** -- has an adverse effect on the operating
 09:36:27 **10** airflow environment which could lead to surgical-site
 09:36:30 **11** infections. You understand that's the allegation
 09:36:31 **12** being made.
 09:36:32 **13** **A.** My understanding was that the claims are
 09:36:36 **14** that the Bair Hugger device played a role in the
 09:36:38 **15** surgical-site infections, yeah. I don't know -- Not
 09:36:42 **16** the explicit wording you used. Yes, the allegation
 09:36:45 **17** was that Bair Hugger was responsible or had an impact
 09:36:48 **18** on surgical-site infections in patients.
 09:36:50 **19** **Q.** Okay. So when you knew that and then you
 09:36:52 **20** spent 60 to 70 hours getting ready for this, did you
 09:36:55 **21** go and look to see if the unit had ever been tested
 09:36:58 **22** for those things?
 09:36:59 **23** **A.** I'm not an employee of 3M so I had no access
 09:37:02 **24** to any of that information after the fact and so I had
 09:37:05 **25** nothing to go look for.

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09:37:07 **1** **Q.** So in other words, everything that you're
 09:37:09 **2** telling us today that is about refreshed memory from
 09:37:12 **3** the documents are not documents that you went and
 09:37:13 **4** searched for, they're just whatever your lawyers put
 09:37:15 **5** in front of you.
 09:37:19 **6** **A.** Yeah. I mean, I would say I would no
 09:37:21 **7** ability, not being an employee of 3M, to go look for
 09:37:24 **8** documents. So I would say that's an accurate
 09:37:25 **9** statement.
 09:37:26 **10** **Q.** Okay.
 09:37:26 **11** **A.** I didn't bring 3M documents home with me
 09:37:28 **12** when I quit.
 09:37:29 **13** **Q.** Sure.
 09:37:34 **14** Now if you had wanted, before this
 09:37:36 **15** deposition, to look at testing documents, find out
 09:37:39 **16** safety validation, you had wanted to see those
 09:37:42 **17** documents, do you think there's any reason to keep
 09:37:45 **18** them from you?
 09:37:46 **19** **MR. GOSS:** Objection to form.
 09:37:48 **20** **MR. BREWER:** Objection, form.
 09:37:50 **21** **A.** That'd be a question for the attorneys, I
 09:37:52 **22** guess.
 09:37:52 **23** **Q.** No. It's a question for you.
 09:37:54 **24** Do you think it's right, do you think it
 09:37:55 **25** would be proper for you to request those documents and
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09:37:57 **1** have them withheld from you?
 09:37:59 **2** **MR. GOSS:** Same objection. Assumes facts.
 09:38:02 **3** **MR. BREWER:** It's an improper hypothetical.
 09:38:04 **4** I object to the form.
 09:38:06 **5** **A.** Ask it one more time, please.
 09:38:08 **6** **Q.** Sure.
 09:38:09 **7** If you wanted these documents, could you
 09:38:11 **8** have requested them?
 09:38:11 **9** **A.** I could have requested them.
 09:38:12 **10** **Q.** And it wouldn't -- it would be pretty
 09:38:16 **11** abnormal for them to be withheld from you; correct?
 09:38:18 **12** **A.** I have no idea.
 09:38:18 **13** **Q.** Okay.
 09:38:19 **14** **A.** I've never prepared for other cases.
 09:38:23 **15** **Q.** You have a relationship with these folks in
 09:38:24 **16** the room; right?
 09:38:27 **17** **A.** I have met with them, yeah. I guess I don't
 09:38:30 **18** know if you would call it a relationship, but.
 09:38:32 **19** **Q.** I've met with them, he's met with them, but
 09:38:34 **20** they don't -- we don't have relationships.
 09:38:36 **21** You have a relationship with some of the
 09:38:38 **22** people in this room; right? A formal relationship.
 09:38:41 **23** **MR. GOSS:** Objection, vague.
 09:38:42 **24** **A.** Define "formal relationship."
 09:38:44 **25** **Q.** Is that your lawyer?

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09:38:45 **1** **A.** They are a firm that's representing me, yes.
 09:38:47 **2** **Q.** Okay. So that's your lawyer. You
 09:38:49 **3** understand that means you have a relationship with
 09:38:49 **4** them. You have --
 09:38:51 **5** **A.** If you want --
 09:38:52 **6** **Q.** Okay.
 09:38:53 **7** **A.** If you want to make that connection, sure.
 09:38:55 **8** **Q.** So you're not like a person off the street
 09:38:56 **9** asking for documents, you're in a collaborative
 09:38:59 **10** relationship with these folks; right?
 09:39:02 **11** MR. GOSS: Object to form.
 09:39:07 **12** **A.** I'd say that's probably an accurate
 09:39:10 **13** statement.
 09:39:11 **14** **Q.** Right.
 09:39:11 **15** They're paying you money for you to help
 09:39:13 **16** them defend the case.
 09:39:16 **17** MR. GOSS: Object to form.
 09:39:16 **18** MR. BREWER: Objection, assumes facts not
 09:39:18 **19** in evidence.
 09:39:19 **20** **A.** I would --
 09:39:20 **21** MR. BREWER: I think it misstates -- Well
 09:39:21 **22** anyway. Objection to form.
 09:39:23 **23** **A.** I would say that they have compensated me
 09:39:25 **24** for my time in preparation for this case.
 09:39:31 **25** **Q.** And you're providing a consulting service to
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09:39:32 **1** them.
 09:39:34 **2** MR. GOSS: Object to form.
 09:39:35 **3** MR. BREWER: Objection, assumes facts not
 09:39:36 **4** in evidence.
 09:39:36 **5** **A.** Yeah, I don't know if I'd call it a
 09:39:38 **6** consulting service, but I have met with them and went
 09:39:42 **7** through documents and answered questions related to
 09:39:45 **8** the timing and development of the 750.
 09:39:47 **9** **Q.** Right. That's the nature of your
 09:39:49 **10** consulting, right, that you're reviewing technical
 09:39:51 **11** documents and sharing information with them?
 09:39:53 **12** MR. BREWER: Object to the form. I think
 09:39:54 **13** it misstates the testimony.
 09:39:56 **14** **Q.** Right?
 09:39:56 **15** **A.** I don't have any consulting agreement, and
 09:39:57 **16** so I'm not sure if "consulting" is the proper term.
 09:40:01 **17** **Q.** Any more; right? You've had a consulting
 09:40:03 **18** agreement for this litigation, for these Bair Hugger
 09:40:06 **19** cases.
 09:40:06 **20** **A.** In the previous two depositions, yes.
 09:40:09 **21** **Q.** Okay. So you've been doing consulting, you
 09:40:12 **22** -- that consulting has included reviewing technical
 09:40:14 **23** documents and sharing information with the defense.
 09:40:18 **24** **A.** In previous depositions, yes.
 09:40:20 **25** **Q.** Okay. No longer discussing technical
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09:40:23 **1** documents or sharing information with them?
 09:40:25 **2** **A.** No. We -- We discussed documents, but I
 09:40:27 **3** didn't have a formal consulting agreement.
 09:40:30 **4** **Q.** Oh, I see. So the difference now is just
 09:40:32 **5** there's nothing on paper.
 09:40:34 **6** MR. BREWER: Objection, --
 09:40:34 **7** MR. GOSS: Object to form.
 09:40:35 **8** MR. BREWER: -- improper hypothetical.
 09:40:39 **9** **A.** Yeah, I'm not sure I agree with that
 09:40:42 **10** characterization, but there is no signed document for
 09:40:44 **11** a legal consulting agreement.
 09:40:47 **12** **Q.** Okay. Let's jump back to where we kind of
 09:40:49 **13** went off onto a side road there.
 09:40:51 **14** **A.** Okay.
 09:40:52 **15** **Q.** Where we had left off was that you were not
 09:40:54 **16** personally aware of any testing that had been done
 09:40:56 **17** with respect to the effect of the Model 750 on the
 09:40:58 **18** operating room airflow during the development of that
 09:41:00 **19** product.
 09:41:00 **20** Do you remember that?
 09:41:01 **21** **A.** Correct.
 09:41:02 **22** **Q.** Okay. And in fact not just -- when it comes
 09:41:04 **23** down to it, not just testing, but you'll agree with me
 09:41:07 **24** that during the development of the Model 750, you
 09:41:11 **25** didn't have any kind of discussions at all with
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09:41:14 **1** respect to whether it would have an effect on the
 09:41:16 **2** operating room airflow.
 09:41:17 **3** MR. GOSS: Object to form.
 09:41:20 **4** **A.** I don't personally recall any discussions
 09:41:23 **5** that I had with anyone related to that -- to the
 09:41:26 **6** impact it would have on the airflow in the OR.
 09:41:31 **7** **Q.** And that means you, as project lead, in
 09:41:33 **8** discussions with your engineers; correct?
 09:41:38 **9** **A.** Engineers and other team members. But I
 09:41:40 **10** guess the point I'm trying to make is there may have
 09:41:42 **11** been discussion between other individual team members
 09:41:44 **12** that I wasn't present or participating in, so I can't
 09:41:47 **13** exclude that.
 09:41:48 **14** **Q.** Sure.
 09:41:49 **15** And this would include you've never had any
 09:41:51 **16** of kind of those discussions with anybody in the
 09:41:53 **17** clinical department; correct?
 09:41:55 **18** **A.** I do not recall any discussions, no.
 09:41:57 **19** **Q.** You've never had those kind of discussions
 09:41:59 **20** with anybody in upper management; correct?
 09:42:03 **21** **A.** Correct. I don't recall any discussions
 09:42:04 **22** like that.
 09:42:05 **23** **Q.** Okay. Now flow of air in the operating
 09:42:07 **24** room, airborne contamination, these are important
 09:42:09 **25** issues; right?
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00:45:25 1 Q. Sure. Let me just back you up.

00:45:27 2 A. Okay.

00:45:28 3 Q. All I asked you is do you remember telling

00:45:29 4 me that if something changes that could impact the

00:45:32 5 safety assurances in the federal filing it needed to

00:45:34 6 be verified?

00:45:36 7 A. Yes. I recall saying that.

00:45:37 8 Q. Okay. And you will agree with me that

00:45:39 9 something has changed. The air output in this unit

00:45:41 10 has changed.

00:45:43 11 A. Yes, the air output has changed.

00:45:45 12 Q. And the air output is something that is

00:45:46 13 specifically discussed in the safety claims for the

00:45:48 14 unit, the 505.

00:45:51 15 A. Correct.

00:45:51 16 Q. So it would require verification testing

00:45:53 17 that was not performed; correct?

00:45:55 18 MR. GOSS: Object to form.

00:45:58 19 A. Verification testing was performed to verify

00:46:02 20 the increased airflow of the device and the heat

00:46:05 21 transfer rate, but that -- but not anything dealing

00:46:08 22 with OR airflow.

00:46:10 23 Q. Or safety.

00:46:12 24 MR. GOSS: Object to form.

00:46:13 25 A. Well no. I mean there's plenty of safety

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09:48:13 **1** the term "high efficiency" has any tangible meaning
09:48:16 **2** when it comes to filtration. But I do know that the
09:48:19 **3** company, before I started, called the filter in the
09:48:22 **4** 505 a .2 micron high-efficiency filter.

09:48:25 **5 Q.** And in fact at that time, when it was
09:48:27 **6** released in 1996, that was a filter that was capable
09:48:30 **7** of filtering roughly 95 percent of .2 micron
09:48:34 **8** particles. Are you familiar with that?

09:48:36 **9** MR. GOSS: Objection, foundation.

09:48:39 **10** **A.** That value sounds reasonable, but where --

09:48:43 **11** whether it's actually 95 percent, I can't --

09:48:46 **12** **Q.** Okay.

09:48:47 **13** **A.** -- comment or...

09:48:49 **14** **Q.** [REDACTED]

[REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

09:49:03 **20** **Q.** Okay. Now when you were developing the
09:49:05 **21** Model 505 it was your original intention -- your
09:49:10 **22** original plan --

09:49:11 **23** **A.** The 750?

09:49:12 **24** **Q.** Oh, excuse me. Thank you for correcting me.

09:49:14 **25** **A.** Okay.

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09:49:14 **1 Q.** Let's start that over.

09:49:16 **2** When you were developing the Model 750 your
09:49:18 **3** original plan was to use a HEPA filter in the device.

09:49:22 **4 A.** I'm not sure that's an accurate assessment.

09:49:24 **5** It was something that we discussed and entertained and
09:49:26 **6** pursued and investigated, but I'm not sure it was the
09:49:31 **7** intention. Maybe it was a goal because of customer
09:49:35 **8** perceptions.

09:49:35 9 Q. Sure.

09:49:36 **10** Or at least it was something you'd thought
09:49:37 **11** about at one point.

09:49:38 **12** **A.** It was something we'd thought about and
09:49:40 **13** looked at, yes.

09:49:41 **14** **Q.** Right.

09:49:41 **15** But when you actually went into the
09:49:43 **16** development, I want to talk about those kind of
09:49:47 **17** 1999/2000 time period --

09:49:48 **18** **A.** Okay.

09:49:49 **19** Q. -- where you're starting to get the device
09:49:51 **20** off the ground. Part of your design at that point,
09:49:54 **21** your plan was I want the same filter efficiency that's
09:49:56 **22** in the Model 505. We're going to use a substantially
09:50:00 **23** equivalent filter to the 505, not a HEPA filter. Is
09:50:04 **24** that accurate?

09:50:05 **25** MR. GOSS: Object to form.

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09:52:37 1 Q. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

00:52:49 **7** Q. Okay. I'm actually --
00:52:51 **8** Do you want to take a quick moment to read
00:52:52 **9** that letter?

09:52:54 **10** **A.** Yeah, if you're going to ask me --

09:52:56 **11** **Q.** Sure. I'm going to ask you some questions

09:52:57 **12** about it, yep.

09:52:59 **13** **A.** (Witness reviewing exhibit.)
09:53:14 **14** (Discussion off the stenographic record.)
09:54:10 **15** **A.** Okay.
09:54:11 **16** **Q.** Now this is a letter by Mr. Westlin;
09:54:14 **17** correct?

09:54:14 **18** **A.** Correct.

09:54:14 **19** **Q.** Mr. Westlin is in regulatory.

09:54:17 **20** **A.** Correct.

09:54:17 **21** **Q.** Mr. Westlin, in regulatory, is somebody you

09:54:20 **22** might have to deal with from time to time if you had

09:54:22 **23** regulatory questions; for example.

09:54:23 **24** **A.** Correct.

09:54:24 **25** **Q.** And also Mr. Westlin's not a product

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00:54:26 1 engineer; right?

00:54:27 2 A. Correct.

00:54:27 3 Q. So when it comes down to him understanding

00:54:30 4 what's going on with the Model 750 development, that's

00:54:32 5 information he's going to get from outside his

00:54:34 6 department, from somebody like your design engineers.

09:54:37 7 A. Correct.

09:54:37 8 Q. [REDACTED]

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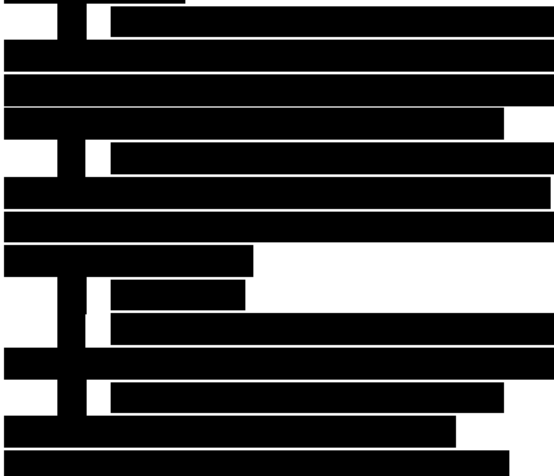
19

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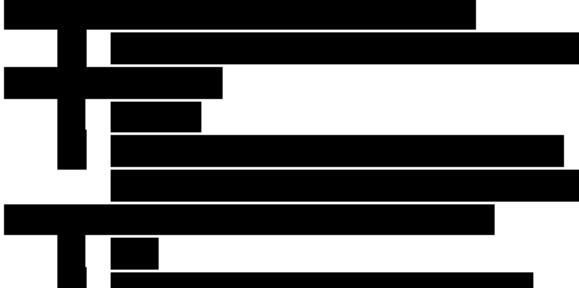
[REDACTED]

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Q. And you never tested the efficiency of this filter at 40 cubic feet per minute; did you?

A. I don't know that it was or was not tested at that volumetric airflow.

Q. You're certainly not aware of it sitting here today; are you?

A. I'm not aware one way or the other.

Q. Seventy hours of preparation for this depo here about the Model 750 development, and you're not able to tell me if there was or was not testing of the efficiency of this filter as it operates in the 750.

MR. GOSS: Objection; argumentative, asked and answered.

A. I am not aware of volumetric airflow testing performed --

Q. So the fil --

A. -- on filter -- at the airflow of the 750.

Q. So the filter was reduced in efficiency, but it was never tested; correct?

MR. GOSS: Object to form.

A. It was tested in the system for the output of the system as far as the airflow rate.

Q. So we knew it's fine as far as airflow, but STIREWALT & ASSOCIATES

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when it comes to about the particles going through the machine you really don't have any idea, do you?

MR. GOSS: Object to form.

A. Yeah. I don't think that'd be a sa -- that'd be too broad of a generalization to say we had no idea.

Q. Well certainly you don't know the amount of particles; for instance, if you threw an X number of particles at this filter at a certain speed of a certain size, there'd be no data that you could pull up for us right now that the company's ever done that would tell us how many particles are going to get through.

MR. GOSS: Object to form.

A. Nothing I could pull up since I don't have access to the data.

Q. Well, and as the project lead, if that was on your little list that you do your checkoffs on, that would be something that would be available to you; right?

A. Not now.

Q. Why -- Why would you think that?

In other words, have you been told that's not available to you?

A. No.

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10:31:00 1 device, here's its features, here's how it works;

10:31:04 2 correct?

10:31:04 3 A. Correct.

10:31:04 4 Q. And the technical people would maybe have to

10:31:06 5 know certain things about the device that the public

10:31:08 6 doesn't even know; right?

10:31:11 7 A. The technical people.

10:31:12 8 Q. Sure. Say you have people who are

10:31:13 9 responsible in the maintenance department for when

10:31:15 10 Bair Huggers are returned. They might have to know,

10:31:18 11 for instance, how the circuit board works; right?

10:31:19 12 A. Internal, yeah.

10:31:20 13 Q. And it's probably not necessary for an

10:31:22 14 anesthesiologist to know how to fix the circuit board.

10:31:25 15 A. That would be correct.

10:31:25 16 Q. Okay. So in other words, there's a training

10:31:27 17 that's given just to employees based on here's the new

10:31:30 18 device and here's how it works.

10:31:32 19 A. Likely, yes.

10:31:34 20 Q. Okay.

10:32:02 21 (Exhibit 282 marked for identification.)

10:32:02 22 BY MR. BANKSTON:

10:32:02 23 Q. [REDACTED]

[REDACTED] [REDACTED] Model 750

10:32:10 25 Technical and Service Training. Correct?

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1 person needs to know?
10:35:08 2 MR. BREWER: Objection, foundation. Go
10:35:09 3 ahead.
10:35:10 4 MR. GOSS: Join.
10:35:12 5 A. I would say in the internal training we
10:35:17 6 would have strived to provide honest information at a
10:35:21 7 level that was relevant for what the person needed to
10:35:24 8 know, not wanting to bog down non-technical people
10:35:31 9 with information that wasn't relevant to what they
10:35:37 10 needed to know.
10:35:38 11 Q. Because those people might not need the
10:35:41 12 technical details is what you're saying.
10:35:42 13 A. I think that's what I'm trying to say, yeah.
10:35:44 14 Q. Okay. On the previous page?
10:35:45 15 A. Yeah.
10:35:46 16 Q. Seems like you really wanted to tell them
10:35:48 17 about technical details, though; right?
10:35:50 18 MR. GOSS: Object to the form. The witness
10:35:51 19 didn't write the document.
10:35:53 20 A. Not knowing who the audience for this was,
10:35:56 21 it could be technical details for a sales force.
10:35:59 22 Q. And those sales force might pass that
10:36:01 23 information on to the customers at some point;
10:36:03 24 correct?
10:36:05 25 A. My understanding is that internal training
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10:36:09 1 documents probably wouldn't have been passed on to
10:36:12 2 customers, so.
10:36:13 3 Q. Oh, no. I didn't -- I --
10:36:14 4 Excuse me. Let me rephrase the question. I
10:36:16 5 didn't mean --
10:36:17 6 Salespeople aren't going to give this
10:36:19 7 document to customers; right? That's not going to
10:36:20 8 happen.
10:36:20 9 A. Should not happen.
10:36:22 10 Q. Okay. But the information that's contained
10:36:23 11 into it is the education that the salespeople are
10:36:25 12 going to take out into the real world; right?
10:36:28 13 A. That, or what's in the operator's manual.
10:36:30 14 Q. If a salesperson tells a customer that the
10:36:32 15 750 has the same filter media as the 505, is that an
10:36:36 16 honest statement to the customer?
10:36:44 17 A. Once again I would say I wouldn't consider
10:36:46 18 it dishonest because it's still glass-filled media and
10:36:50 19 since there's no reference to efficiency in here I
10:36:52 20 wouldn't necessarily call it dishonest.
10:36:55 21 Q. Okay. You're comfortable with salesmen
10:36:56 22 saying that to customers.
10:36:59 23 A. Based on what I know, yeah.
10:37:07 24 Q. [REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]

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10:39:12 1 patients this was used on.

10:39:17 2 A. I do not recall there being any specific

10:39:19 3 tests being done on the verification that addressed

10:39:24 4 filtration efficiency, or --

10:39:27 5 Q. Seventy hours of preparation. Did any of it

10:39:30 6 discuss safety verification of this product?

10:39:33 7 MR. GOSS: Object to the preamble.

10:39:35 8 MR. BANKSTON: Which part of the preamble?

10:39:37 9 MR. GOSS: You keep bringing up the 70

10:39:39 10 hours.

10:39:39 11 Q. I'm asking him --

10:39:41 12 MR. GOSS: You can just ask him questions.

10:39:42 13 Q. -- of the 70 hours, which -- was there any

10:39:44 14 part of that 70 hours that you discussed safety

10:39:46 15 verification testing of this product?

10:39:48 16 MR. BREWER: Well I'm going to instruct you

10:39:49 17 not to reveal any conversations you had with lawyers
10:39:55 18 that were intended to be confidential and privileged.
10:40:01 19 If -- Well, that's my instruction.
10:40:03 20 Q. During your 70 hours of preparation did you
10:40:06 21 come to any sort of greater recollection or
10:40:08 22 understanding about the safety verification of this
10:40:11 23 product with regard to airborne contamination or
10:40:14 24 infection?
10:40:17 25 A. I'm sorry. Ask that one more time.

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The figure displays a vertical timeline with a series of horizontal bars representing event durations. The timeline is marked with a vertical axis on the left, and the events are color-coded: red, blue, green, and yellow. The first event (red) is the longest, followed by the second (blue), third (green), and fourth (yellow). The timeline ends with a final red bar.

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10:52:18

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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8 A

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11:01:36 1 MR. GOSS: Object to form.
11:01:36 2 A. I don't know that anybody did or did not do
11:01:39 3 that.
11:01:39 4 Q. I'm not asking if anybody did or didn't.
11:01:41 5 I'm asking: You had that ability.
11:01:43 6 A. I know how to use a phone, so yes, --
11:01:43 7 Q. Yeah.
11:01:45 8 A. -- I think I would have been able to do
11:01:47 9 that.
11:01:48 10 Q. And you had a little thing probably next to
11:01:50 11 your phone that gave you some extensions for different
11:01:51 12 people around the company?
11:01:52 13 A. I could look up by name, but yes.
11:01:54 14 Q. Yes. So there was a way to get in touch
11:01:56 15 with regulatory and ask them this question; right?
11:02:01 16 A. And I knew where he sat, yes.
11:02:05 17 Q. Yes. Okay.
11:02:05 18 (Interruption by the reporter.)
11:02:08 19 Q. I believe your answer is you "knew where he
11:02:08 20 sat"?
11:02:08 21 A. Yes.
11:02:09 22 Q. At that point y'all had a facility, you are
11:02:14 23 in the same building; right?
11:02:16 24 A. I'm sorry. Ask it -- Say --
11:02:16 25 Q. You --

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11:02:17 1 At the time of this, 2008, you and Dave
11:02:19 2 Westlin are in the same facility.
11:02:21 3 A. Eden Prairie, correct.
11:02:24 4 Q. Okay. Now in this Exhibit 47 it talks about
11:02:27 5 the filter

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11:07:55

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Q. Okay. There's some discussion then in this

11:07:58

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

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[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

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Q. But you'll agree with me that concerns about
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11:34:39 1 they ask or we think there's a need to know. So it
11:34:42 2 wasn't a, you know, intentional try to hide
11:34:45 3 information, it was trying to gauge what would be
11:34:47 4 relevant to their level of education or interest.
11:34:50 5 Q. Well Mr. Zgoda, you do understand in your
11:34:52 6 subsequent years in the country -- I mean, excuse me.
11:34:55 7 You understand, in your subsequent years
11:34:57 8 with the company, that there was intentional decisions
11:34:59 9 made to withhold and intentionally not disclose
11:35:03 10 filtration-level efficiencies in response to direct
11:35:06 11 customer questions.
11:35:07 12 MR. GOSS: Object to form.
11:35:08 13 A. I have no knowledge of that whatsoever.
11:35:10 14 Q. Okay. You've never seen documents in this
11:35:13 15 case, in your preparation for this case, in which that
11:35:15 16 occurred?
11:35:17 17 A. Oh, I don't believe so, no.
11:35:19 18 Q. That would not be a good practice; would it?
11:35:22 19 MR. GOSS: Object to form.
11:35:24 20 A. I don't know how to answer that.
11:35:26 21 Q. Well, okay. So you -- you did some time
11:35:30 22 supporting these product lines, supported the 750 and
11:35:32 23 the 505 product lines.
11:35:33 24 A. The 750.
11:35:34 25 Q. Okay. And occasionally engineering

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1 questions would be directed in your direction.
11:35:38 2 A. Engineering questions from who?
11:35:41 3 Q. From anybody.
11:35:42 4 A. Technical questions, yeah.
11:35:44 5 Q. Sure. So salespeople, for instance, might
11:35:46 6 be dealing with customers --
11:35:46 7 A. Yeah.
11:35:47 8 Q. -- and they may not know exactly how to
11:35:49 9 answer a question; right?
11:35:50 10 A. Correct.
11:35:50 11 Q. And they may come to you and say, Mr. Zgoda,
11:35:53 12 what should I say to this?
11:35:54 13 A. Yes. That has happened.
11:35:56 14 Q. Okay. So -- And that's part of your job
11:35:58 15 responsibility. You need to know how to do that
11:36:00 16 responsibly; correct?
11:36:03 17 A. I would say it would be an uncommunicated
11:36:05 18 expectation, but that would be a reasonable
11:36:08 19 expectation, yeah.
11:36:09 20 Q. And in doing, in fulfilling that job
11:36:11 21 function you have certainly responsibilities, ethical
11:36:14 22 and moral responsibilities as a corporate person to
11:36:16 23 your customers at the end of the day. You gotta do
11:36:18 24 your job ethically; right?
11:36:20 25 MR. GOSS: Object to form.
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11:36:21 **1** MR. BREWER: Objection, foundation.
 11:36:21 **2** **A.** I would say everybody has to do their job
 11:36:23 **3** ethically, not just engineers.
 11:36:25 **4** **Q.** And you need to know how to be able to tell
 11:36:27 **5** good behavior from bad behavior in your corporate
 11:36:29 **6** environment; don't you?
 11:36:31 **7** MR. GOSS: Objection to form.
 11:36:32 **8** **A.** I would say every company needs to know how
 11:36:34 **9** to do that, yeah.
 11:36:36 **10** **Q.** Okay. Let me -- Let me ask you a situation.
 11:36:37 **11** A salesperson comes to you and says, customer wants to
 11:36:40 **12** know what the filtration efficiency is, wants to know
 11:36:43 **13** the specifications, the technical specifications for
 11:36:46 **14** this filter. Would it be okay for an engineer in your
 11:36:49 **15** department to turn around to that salesperson and say:
 11:36:51 **16** "Don't give it to them? We do not want to disclose
 11:36:55 **17** that information."
 11:36:55 **18** Is that -- Is that an --
 11:36:57 **19** MR. GOSS: Objection --
 11:36:58 **20** **Q.** -- okay thing to do to your customers?
 11:37:00 **21** MR. GOSS: Objection; form, improper
 11:37:02 **22** hypothetical.
 11:37:03 **23** MR. BREWER: Yeah. I join in that.
 11:37:04 **24** **A.** I'm sorry. That always throws me.
 11:37:06 **25** Can you ask me the question again?
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11:37:08 **1** **Q.** I know it does. Absolutely. Unfortunately.
 11:37:11 **2** I'm trying to ask you if a salesperson came
 11:37:13 **3** to you and said a customer had a direct inquiry --
 11:37:17 **4** **A.** Umm-hmm.
 11:37:17 **5** **Q.** -- about what the technical specifications
 11:37:19 **6** of the filter were in terms of efficiency, if one of
 11:37:22 **7** your engineers told that salesperson: "Do not tell
 11:37:26 **8** the customer. Do not disclose that information. We
 11:37:29 **9** don't want to disclose that information." Would you
 11:37:31 **10** be okay with your engineer doing that?
 11:37:34 **11** MR. GOSS: Same objection.
 11:37:35 **12** **A.** I guess it would depend on the motive as far
 11:37:38 **13** as why they didn't want to communicate that, if it was
 11:37:41 **14** some kind of competitive, you know, advantage or
 11:37:43 **15** something like that. So I'd need more context as far
 11:37:45 **16** as the motive for not communicating that. There are
 11:37:48 **17** very plausible reasons why you don't want to share
 11:37:51 **18** technical data with customers in case they are asking
 11:37:53 **19** on behalf of -- I mean of customers in case they're
 11:37:57 **20** asking on behalf of competitors. So I need context.
 11:38:00 **21** **Q.** So there are -- for instance, industrial
 11:38:02 **22** espionage could be a reason not to disclose
 11:38:04 **23** information. You get what I'm saying?
 11:38:09 **24** **A.** If I understand the question. I mean, if
 11:38:11 **25** you were -- Personally if I was concerned that a
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11:38:14 **1** customer was asking on behalf of a competitor and it
 11:38:17 **2** was information that we didn't want them to have,
 11:38:20 **3** yeah, I mean, I think that'd be a plausible reason to
 11:38:23 **4** say, you know, I'm not going to answer at this time
 11:38:25 **5** why, you know, dig into it deeper.
 11:38:27 **6** **Q.** Yeah. Okay. But if a caretaker, clinician
 11:38:31 **7** is asking and it's reasonably apparent he's doing so
 11:38:34 **8** to make choices in the kind of care he delivers to his
 11:38:36 **9** patient, the company has a responsibility to provide
 11:38:38 **10** responsible information; doesn't it?
 11:38:41 **11** **A.** If you can decipher what their motive is,
 11:38:43 **12** yeah. I think get back to being honest as long as
 11:38:47 **13** it's, once again, information that you don't want to
 11:38:49 **14** keep private for some competitive reason.
 11:38:52 **15** **Q.** So the policy then could be boiled down to,
 11:38:54 **16** we generally want to provide customers with the
 11:38:56 **17** information they request about clinical issues, except
 11:39:00 **18** if we suspect them of spying on us.
 11:39:02 **19** MR. GOSS: Objection to form; foundation,
 11:39:03 **20** argumentative.
 11:39:05 **21** **A.** I don't think I said that or didn't mean to
 11:39:08 **22** say that.
 11:39:09 **23** **Q.** Why -- I don't --
 11:39:10 **24** I'm having trouble understanding why you
 11:39:11 **25** would ever want to keep your filtration rate a secret.
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11:39:15 **1** Is that a technical secret that you were told to keep
 11:39:17 **2** secret, or?
 11:39:18 **3** **A.** I personally was not told, but I was never
 11:39:20 **4** asked the question.
 11:39:21 **5** **Q.** Okay. Now going back to the 750 and no
 11:39:28 **6** complaints about its efficiency. You remember that
 11:39:30 **7** being talked about in the test report?
 11:39:32 **8** **A.** Yeah.
 11:39:33 **9** **Q.** And so I guess the understanding is if there
 11:39:35 **10** had been complaints, then that would be something you
 11:39:37 **11** would look into.
 11:39:40 **12** **A.** Yeah. It would have been more of a
 11:39:42 **13** consideration if we had known that there'd been
 11:39:44 **14** concerns raised about it.
 11:39:46 **15** **Q.** But until those concerns are raised, that's
 11:39:48 **16** not on your radar.
 11:39:52 **17** **A.** I would say that's accurate. Once again,
 11:39:55 **18** what we really concentrated on was the effectiveness
 11:39:57 **19** of the heat transfer of the device since we, you know,
 11:40:01 **20** deliver that as the therapy. So it was all airflow
 11:40:03 **21** and safe temperature distribution and fault condition
 11:40:09 **22** concerns/awareness.
 11:40:11 **23** **Q.** So I guess --
 11:40:13 **24** I mean I guess the attitude became, if a lot
 11:40:16 **25** of people get sick or die I'm sure someone well let us
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11:40:20 **1** know; right?

11:40:20 **2** MR. GOSS: Object to form, --

11:40:21 **3** **Q.** That's basically where y'all were at?

11:40:21 **4** MR. GOSS: -- argumentative.

11:40:23 **5** MR. BREWER: Objection to the form.

11:40:28 **6** **A.** I would say that's not accurate. And not

11:40:29 **7** being a person that fields customer comments or

11:40:32 **8** complaints, I mean you're asking me about an area that

11:40:34 **9** isn't really my sandbox.

11:40:38 **10** **Q.** Being patient safety.

11:40:40 **11** MR. BREWER: Objection to form.

11:40:42 **12** **A.** Feedback from customers.

11:40:44 **13** **Q.** Ahh, okay.

11:40:44 **14** So you have other people in the company who

11:40:46 **15** rely on collecting information from the customers

11:40:48 **16** about maybe what's going on with the product.

11:40:50 **17** **A.** All feedback, comments, complaints,

11:40:55 **18** commendations were supposed to be logged through

11:40:58 **19** customer care/customer service, whatever the

11:41:00 **20** department was called.

11:41:02 **21** **Q.** Well what I'm -- guess I'm trying to get at

11:41:04 **22** is that the justification in this report that we've

11:41:06 **23** been using it on the 750 for years and nobody's

11:41:09 **24** complained, doesn't that really mean that those

11:41:12 **25** thousands of people who it's been used on were

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11:41:15 **1** basically unknowing test subjects?

11:41:17 **2** MR. GOSS: Objection to form; foundation,

11:41:19 **3** --

11:41:19 **4** **Q.** Do you see what I mean by that?

11:41:21 **5** MR. GOSS: -- argumentative.

11:41:22 **6** MR. BREWER: Objection, form.

11:41:23 **7** **A.** I guess I would disagree with that. You

11:41:25 **8** look at the clinical studies which I'm not keenly

11:41:29 **9** aware of, but aware of the general overarching theme

11:41:33 **10** that forced-air warming such as Bair Hugger reduces,

11:41:37 **11** you know, complications from hypothermia and

11:41:39 **12** surgical-site infections and so I think it's just

11:41:41 **13** quite the opposite of what you --

11:41:41 **14** **Q.** Right. But --

11:41:43 **15** **A.** -- just implied.

11:41:45 **16** **Q.** -- there's no clinical studies on

11:41:48 **17** contamination and infection regarding the 750 before

11:41:49 **18** you put it on the market; is there?

11:41:54 **19** **A.** Related to the 750? No. I mean, I think

11:41:59 **20** that would be --

11:42:00 **21** Well I would think I would be aware of that,

11:42:02 **22** but I guess I'm not aware of any.

11:42:06 **23** **Q.** Now --

11:42:07 **24** And you had no way at this time, when this

11:42:08 **25** report was done, you had no way of knowing whether

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11:42:11 **1** those changes to the 750 were causing wound infections

11:42:14 **2** in the field. You had no way of knowing that; right?

11:42:18 **3** MR. BREWER: Objection, foundation.

11:42:19 **4** MR. GOSS: Join.

11:42:20 **5** **A.** I personally --

11:42:25 **6** It's plausible I personally wouldn't be

11:42:27 **7** aware of that information.

11:42:28 **8** **Q.** I mean at this point all you knew is that

11:42:30 **9** nobody was complaining in terms of that subject.

11:42:34 **10** MR. GOSS: Objection, foundation.

11:42:35 **11** **A.** I was --

11:42:36 **12** All I was aware of was that I wasn't

11:42:38 **13** personally aware of anybody complaining about that.

11:42:40 **14** **Q.** Okay.

11:42:41 **15** **A.** It had not been brought to my attention.

11:42:45 **16** **Q.** You'll agree with me that if the company

11:42:48 **17** wanted to use reduced filtration in the 505 with its

11:42:53 **18** federal clearance, you would need to prove that that

11:42:56 **19** reduced filtration was still safe. That was the

11:42:58 **20** company's responsibility.

11:43:03 **21** MR. BREWER: Objection, foundation.

11:43:06 **22** **A.** Yeah. Going back to, you know, not knowing

11:43:08 **23** what was in the regulatory filings, I wouldn't --

11:43:15 **24** didn't know that that was an item that should have

11:43:18 **25** been addressed.

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11:43:20 **1** **Q.** That somehow didn't appear on your list.

11:43:23 **2** Remember we were talking about that checklist of

11:43:25 **3** safety testing that had to be done? That didn't

11:43:27 **4** appear on your list.

11:43:29 **5** **A.** There would have been no checklist for a

11:43:32 **6** design change like that, but yeah. I mean, checking

11:43:34 **7** for, however you phrased it, you know, particle counts

11:43:40 **8** in the OR was not on my radar for testing as far as

11:43:45 **9** design changes go.

11:43:46 **10** **Q.** Well you remember when we talked about if

11:43:47 **11** there's anything in the product that changes that

11:43:50 **12** could affect the safety assurances made in the

11:43:52 **13** government's filing that that needs verification and

11:43:55 **14** validation; right?

11:43:57 **15** **A.** I recall us discussing that.

11:43:58 **16** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]


[REDACTED]

[REDACTED]

[REDACTED]

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11:52:36 **12** **Q.** [REDACTED]

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11:55:36 **1** aware of that and the particle sizes, --

11:55:41 **2** **Q.** That --

11:55:42 **3** **A.** -- that the bacteria was bigger than .2

11:55:46 **4** micron.

11:55:46 **5** **Q.** So in other words, when the people

11:55:47 **6** developing the 505 developed it, and we see from the

11:55:50 **7** federal clearance that they considered the possibility

11:55:53 **8** of airborne contamination and its mitigation through a

11:55:56 **9** filter, you're telling me that that is not really what

11:55:59 **10** was in front of you when you were developing your

11:56:01 **11** product.

11:56:05 **12** MR. GOSS: Objection, form.

11:56:06 **13** **A.** I can say that it was not front and center

11:56:10 **14** when I developed the product. I -- I wasn't around

11:56:12 **15** when the 505 was developed and so I don't know how

11:56:15 **16** important or prevalent it was.

11:56:17 **17** **Q.** When you --

11:56:18 **18** When you made the change to the filter,

11:56:20 **19** either for the 750 or the 505, even as late as 2008,

11:56:24 **20** you and your engineers did not know how much bacteria

11:56:28 **21** could be allowed to pass through that filter without

11:56:31 **22** it being dangerous. Correct?

11:56:34 **23** MR. GOSS: Object to form.

11:56:38 **24** **A.** Yeah. We did not perform testing as far as

11:56:41 **25** particle count or bacteria count through the filter.

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11:56:45 **1** **Q.** Yeah. I mean, I'm saying regardless of all

11:56:48 **2** the testing you didn't do, at the end of the day you

11:56:52 **3** did not know how much bacteria could be allowed to

11:56:55 **4** pass through the filter and it not be dangerous.

11:56:55 **5** MR. GOSS: Objection.

11:56:58 **6** **Q.** You didn't know that.

11:57:00 **7** **A.** I personally did not, no.

11:57:02 **8** **Q.** And you were making changes to the filter's

11:57:04 **9** efficiency without that key piece of information.

11:57:07 **10** MR. GOSS: Objection --

11:57:08 **11** **Q.** You agree with me on that?

11:57:09 **12** MR. GOSS: Objection to form.

11:57:09 **13** **A.** I would contend that I didn't make the

11:57:11 **14** change. I was, you know, cc'd on it. But I -- You

11:57:14 **15** know, it wasn't my personal decision to make that

11:57:16 **16** change so I can't say definitively that nobody else on

11:57:20 **17** the team was aware of that or knew about that or

11:57:23 **18** considered that.

11:57:25 **19** **Q.** I notice that --

11:57:27 **20** Are you speaking now, and let me make sure I

11:57:29 **21** have it clear, because there's two filter changes.

11:57:32 **22** **A.** Umm-hmm.

11:57:32 **23** **Q.** There's the change in roughly 2000/2002

11:57:35 **24** where the 750 is introduced and there's a new filter

11:57:38 **25** put on the 750. Okay?

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11:57:40 **1** **A.** Correct.

11:57:40 **2** **Q.** At the end of the day if I have to put the

11:57:42 **3** buck on somebody's desk, that's your desk that that

11:57:45 **4** changed under; right?

11:57:51 **5** MR. BREWER: Objection, foundation.

11:57:55 **6** **A.** I'm not sure the buck is on anybody's desk,

11:57:58 **7** any individual's desk in that regard.

11:58:00 **8** **Q.** So nobody has responsibility at the end of

11:58:02 **9** the day, or accountability for changing that filter.

11:58:04 **10** If I'm looking for the person who's accountable for

11:58:08 **11** changing that filter and making it happen, approving

11:58:09 **12** it and giving -- That person does not exist.

11:58:12 **13** MR. GOSS: Objection, mischaracterizes.

11:58:16 **14** **A.** I would say that it didn't rely solely on

11:58:20 **15** one single individual.

11:58:22 **16** **Q.** Okay. If I'm CEO and I want to come find

11:58:25 **17** out, hey, I know there's been a filter change, I want

11:58:29 **18** to find out why it was done and what was done to make

11:58:32 **19** sure it was safe. And I come to you and I say, Mr.

11:58:35 **20** Zgoda, where can I get that information; who's going

11:58:37 **21** to tell me? Is your answer to me, I don't know,

11:58:39 **22** you're going to have to go talk to everybody?

11:58:42 **23** **A.** It would depe --

11:58:42 **24** MR. GOSS: Objection, argumentative.

11:58:43 **25** **A.** It would depend on where you're at in the

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11:58:45 **1** development process or support process, but it boils

11:58:48 **2** down to the team that supports or develops projects --

11:58:52 **3** products being responsible for the --

11:58:55 **4** **Q.** How many members on your team?

11:58:57 **5** **A.** Well it depends on whether it's development

11:59:00 **6** or ongoing support, but typically it's a

11:59:02 **7** cross-functional team represented by every part of the

11:59:05 **8** functional organization; purchasing, marketing,

11:59:08 **9** engineering, manufacturing, quality, regulatory.

11:59:12 **10** **Q.** Dozens of people.

11:59:13 **11** **A.** I'd say less than a dozen people but, you

11:59:17 **12** know, somewhere between 6 and 10.

11:59:18 **13** **Q.** Okay. So if I'm CEO and I came to you with

11:59:21 **14** that question I have to go talk to all those people to

11:59:23 **15** get an answer. There's not a person who's accountable

11:59:26 **16** at the end of the day who can give me that

11:59:28 **17** information.

11:59:32 **18** **A.** I'm not sure there's a case of it being one

11:59:36 **19** indi -- being any single individual for any particular

11:59:39 **20** case. I mean, it may be somebody different depending

11:59:43 **21** on the change.

11:59:44 **22** **Q.** Okay. I want to get back to this issue of

11:59:48 **23** an unknown amount of material passing through the

11:59:51 **24** filter and whether or not you could say it was

11:59:53 **25** dangerous or not.

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12:03:59

1

12:04:26

14

participated in that or done that and so, no, I had no

12:04:29

15

knowledge of that.

12:04:33

16

Q. Let's talk about one more document and then

12:04:35

17

we'll go to lunch.

12:04:35

18

A. Okay.

12:04:37

19

Q. I think we're around a good time to do that.

12:04:39

20

So let's talk about one more.

12:04:39

21

(Discussion off the stenographic record.)

12:04:47

22

Q. Now one of the things with the filter over

12:04:50

23

the years has been there's been a recommendation for a

12:04:52

24

filter change interval. You know what I mean by that?

12:04:55

25

A. Yes.

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12:04:56

1

Q. Okay. And that has been debated a bit

12:04:58

2

within the company. You'd agree?

12:05:00

3

A. Yes, I'd agree with that.

12:05:02

4

12:07:04

4

Sitting here today, do you think you did

12:07:05

5

that at some point during a part of the development period?

12:07:07

6

12:07:08

7

A. I personally did not, no.

12:07:09

8

12:07:12

9

Q. Okay. So any verification that has been done, any testing that's been done on the unit with respect to its filter, was done on new units; right?

12:07:15

10

12:07:25

11

A. Yeah. That's the only testing I'm aware of.

12:07:27

12

I can't exclude the fact that testing wouldn't have

12:07:29

13

been done on a unit that was returned from the field,

12:07:32

14

but I don't -- I don't personally re -- I'm not

12:07:33

15

personally aware of any testing like blower curves

12:07:42

16

that would have been done on those.

12:07:43

17

Q. Do you think --

12:07:43

18

(Interruption by the reporter.)

12:07:44

19

Q. Do you think, sitting here today, that any

12:07:46

20

point subsequent to 2009 you ever ordered this testing to be conducted?

12:07:49

21

12:07:53

22

A. I don't -- I don't believe I requested that

12:07:56

23

or was involved in any testing similar to that, no.

12:08:00

24

Q. Okay.

12:08:00

25

A. And I think the logic for me was that, you

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12:08:04 **1** know, as filters get clogged they only get more
 12:08:06 **2** efficient, they trap more particulate and so the
 12:08:09 **3** interest would have been in is, you know, the filter
 12:08:11 **4** so occluded that it affects the temperature
 12:08:13 **5** performance of the device or the airflow out of the
 12:08:14 **6** device.
 12:08:16 **7** **Q.** What testing are you relying on to say that?
 12:08:19 **8** **A.** Just general knowledge obtained about
 12:08:22 **9** filtration, and that as you get more particulates in
 12:08:24 **10** it you basically occlude the airflow path so they get
 12:08:28 **11** more restrictive.
 12:08:29 **12** **Q.** Okay. And do you know if that has any
 12:08:31 **13** effect, the occlusion of material on the filter, do
 12:08:34 **14** you know if that has any effect on the integrity of
 12:08:37 **15** the filter substrate or medium? Do you know that
 12:08:40 **16** sitting here today?
 12:08:41 **17** **A.** Not definitively, no.
 12:08:42 **18** **Q.** Okay. In other words, if I put foreign
 12:08:44 **19** particles, possibly consisting of biological
 12:08:46 **20** materials, onto that filter and let them sit there for
 12:08:49 **21** months at a time, do you have any knowledge about
 12:08:51 **22** whether that will break down the filter consistency or
 12:08:53 **23** its fibrous construction?
 12:08:55 **24** **A.** I have no knowledge of that.
 12:08:56 **25** **Q.** And then if we were to test a unit under the

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12:08:59 **1** way Mr. Poppen's describing, we would have a better
 12:09:01 **2** understanding of that issue, wouldn't we?
 12:09:05 **3** **MR. GOSS:** Object to form.
 12:09:08 **4** **A.** I guess I'm not sure I would agree with that
 12:09:10 **5** because when you're -- if you want to run a unit for
 12:09:13 **6** that amount of time, we have -- we would have a hard
 12:09:16 **7** time recreating the environment used and actual
 12:09:19 **8** facilities. So taking and putting it on a bench in a
 12:09:21 **9** lab may not be indicative of what you would get in a
 12:09:26 **10** a -- an account.
 12:09:27 **11** **Q.** Say an operating room, for example; right?
 12:09:29 **12** **A.** Correct.
 12:09:29 **13** **Q.** Because what's going on in an operating room
 12:09:32 **14** is a little different than, say, what's going on in
 12:09:34 **15** this room.
 12:09:35 **16** **A.** Correct.
 12:09:35 **17** **Q.** And you would agree that there are materials
 12:09:37 **18** in an operating room, biological materials that are
 12:09:39 **19** probably not present in the same amount that they are
 12:09:41 **20** in other environments.
 12:09:44 **21** **MR. GOSS:** Object to form.
 12:09:45 **22** **MR. BREWER:** Objection, foundation.
 12:09:47 **23** **A.** I don't know. I couldn't comment on that.
 12:09:48 **24** I mean, I know there's bacteria everywhere, but as far
 12:09:51 **25** as the amounts in an operating room, I don't know.

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12:09:53 **1** **Q.** Okay.
 12:09:55 **2** **MR. BANKSTON:** Let's go ahead and take a
 12:09:58 **3** break for lunch, then. I think it's a good spot.
 12:10:01 **4** **THE WITNESS:** Okay.
 12:10:02 **5** **THE REPORTER:** Off the record, please.
 12:10:03 **6** (Luncheon recess taken at
7 approximately 12:10 p.m.)
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1 **AFTERNOON SESSION**
2 (Deposition reconvened at
3 approximately 1:06 p.m.)
4 **BY MR. BANKSTON:**
 13:06:09 **5** **Q.** All right. Mr. Zgoda, we've had a lunch
 13:06:11 **6** break and now we're going to move to a little bit of a
 13:06:14 **7** different topic, okay?
 13:06:16 **8** **A.** Okay.
 13:06:16 **9** **Q.** We've been talking quite a bit today about
 13:06:18 **10** the M20 filter, and the transition to the M20 filter.
 13:06:23 **11** You knew that after the implementation of the lower
 13:06:28 **12** efficiency M20 filter that the company was receiving
 13:06:33 **13** numerous reports from the field and in the published
 13:06:36 **14** literature showing bacterial growth in Bair Hugger
 13:06:40 **15** units beyond the filter.
 13:06:42 **16** **MR. GOSS:** Object to form.
 13:06:45 **17** **A.** I was only partially aware of hallway
 13:06:50 **18** conversations where Scott supposedly did some
 13:06:54 **19** swabbing, but no, I wouldn't say I was aware of
 13:06:57 **20** numerous reports or complaints. I was never informed
 13:07:00 **21** of that.
 13:07:00 **22** **Q.** Who did the swabbing?
 13:07:02 **23** **A.** Scott Augustine is what I was told.
 13:07:03 **24** **Q.** Oh, okay.
 13:07:04 **25** So in terms of reports of bacterial growth

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13:07:08 **1** in the Bair Hugger units, do you, sitting here today,
 13:07:11 **2** know if people other than Scott Augustine had reported
 13:07:13 **3** that to the company?
 13:07:15 **4** MR. GOSS: Object to form.
 13:07:16 **5** **A.** I'm not aware of that one way or the other.
 13:07:18 **6** I was -- It was not mentioned to me.
 13:07:20 **7** **Q.** Certainly you knew that in the years
 13:07:24 **8** following the implementation of that filter, the
 13:07:27 **9** company was struggling to battle certain perceptions
 13:07:30 **10** in the marketplace relating to infection and
 13:07:33 **11** contamination.
 13:07:35 **12** **A.** My take on it was I knew -- excuse me -- you
 13:07:39 **13** know, I knew Scott was creating, you know, allegations
 13:07:43 **14** and as a company we were, you know, responding to what
 13:07:46 **15** he was -- what he was saying.
 13:07:48 **16** **Q.** So I take it at that time you weren't aware
 13:07:50 **17** of independent published literature on these subjects.
 13:07:53 **18** **A.** Correct. I'm not aware of any literature
 13:07:56 **19** really related to that.
 13:07:57 **20** [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 13:08:07 **24** **A.** Yes. I worked on that.
 13:08:09 **25** **Q.** And you were one of four people at the
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13:08:11 **1** company who went to California to work with IDEO.
 13:08:16 **2** **A.** Correct.
 13:08:16 **3** **Q.** And those four people would be the CEO, Gary
 13:08:18 **4** Maharaj. That would be one; right?
 13:08:21 **5** **A.** I recall Gary being there, yep.
 13:08:23 **6** **Q.** Do you remember the vice president, Ms.
 13:08:24 **7** Woodwick-Sides, going to that?
 13:08:26 **8** **A.** Yeah. I think it was her, Gary, Gary and
 13:08:29 **9** myself, but.
 13:08:30 **10** **Q.** And "Gary" being the director of R&D.
 13:08:32 **11** **A.** Sorry. Gary Hansen, yes.
 13:08:34 **12** **Q.** Okay. And Gary Hansen, director of R&D.
 13:08:35 **13** And then you were the final member of that team as the
 13:08:38 **14** engineer who went to those meetings; correct?
 13:08:41 **15** **A.** I mean, I will take your word for that. I
 13:08:43 **16** know I was there and I know they were there. Whether
 13:08:45 **17** that was the entire group, I just don't recall.
 13:08:48 **18** **Q.** Okay. Now one of the things that you've
 13:08:49 **19** been paid by the lawyers in this case for is your
 13:08:53 **20** knowledge relating to Project Ducky; correct?
 13:08:55 **21** MR. GOSS: Object to form.
 13:08:57 **22** MR. BREWER: Objection.
 13:08:57 **23** **A.** I would say I was paid for my time to go
 13:09:00 **24** through the documents, but I'm not sure I was paid for
 13:09:02 **25** my knowledge.
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13:09:08 **1** **Q.** So I want to go back to your Johnson
 13:09:10 **2** deposition.
 13:09:11 **3** **A.** Okay.
 13:09:13 **4** **Q.** And do you remember being asked about what
 13:09:15 **5** type of consulting you were doing, and telling that it
 13:09:18 **6** was relating to the 750 development effort and Project
 13:09:21 **7** Ducky. Those are the things you consulted on;
 13:09:23 **8** correct?
 13:09:26 **9** **A.** If that's what I said, that's what I said.
 13:09:28 **10** And those were the documents or the areas of focus on
 13:09:31 **11** the information that we reviewed for the previous
 13:09:34 **12** depositions --
 13:09:34 **13** **Q.** Okay.
 13:09:35 **14** **A.** -- if that's the same thing.
 13:09:38 **15** **Q.** Now when you began --
 13:09:40 **16** [REDACTED]
 13:09:43 **17** the [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 13:10:00 **24** MR. GOSS: Object to form, foundation.
 13:10:05 **25** MR. BREWER: Objection, foundation.
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13:10:06 **1** **A.** Yeah. See I'm not sure I'd characterize it
 13:10:09 **2** that way. I wasn't -- I wasn't privy to discussions
 13:10:13 **3** of that if that were the case.
 13:10:16 **4** **Q.** Okay.
 13:10:16 **5** **A.** You know, I was brought into the project,
 13:10:18 **6** didn't initiate it.
 13:10:20 **7** **Q.** Who brought you in?
 13:10:23 **8** **A.** I mean, it would have been Gary, Teri or
 13:10:26 **9** Gary. I don't remember who initially broached the
 13:10:28 **10** subject to me, but it likely would have been one of
 13:10:30 **11** those three.
 13:10:31 **12** **Q.** Okay.
 13:11:18 **13** (Discussion off the stenographic record.)
 13:11:18 **14** (Exhibit 291 marked for identification.)
 13:11:18 **15** BY MR. BANKSTON:
 13:11:19 **16** **Q.** [REDACTED]
 13:11:22 **17** [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 13:11:43 **25** correct?
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13:11:43

1

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13:15:05

4 into the MERV standards because whatever I knew about
5 the MERV standards I definitely don't remember.

13:15:08

6 Q. Okay. And that's --

13:15:11

7 You've gained no greater recollection of
8 that between your 70 hours of preparation?

13:15:14

9 **A.** No. My recollection is that Gary Hansen did
10 most of the MERV calculations, or not really
11 calculations, but investigation.

13:15:16

13-15-18

12 Q. Well you were --

13:15:18

13:15:20

13 **A.** I was more, you know, getting prototypes,
14 getting them tested, stuff like that.

13:15:22

13:15:23

15 **Q.** You are aware, though, that the M20 filter
16 does not have a dust spot efficiency of greater than
17 95 percent.

13:15:25

Year	1990	1995	2000	2005	2010
1990	100	100	100	100	100
1995	100	100	100	100	100
2000	100	100	100	100	100
2005	100	100	100	100	100
2010	100	100	100	100	100

13:15:28

13:15:32

19.19.02

18 MR. GOSS: Objection to form, foundation.

Year	1990	1995	2000	2005	2010
...

13:15:36

19 **A.** Well once again I don't know that because I
20 don't know what "dust spot efficiency" means.

13:15:38

References

21 **Q.** For the person making decisions on the
22 filter of the unit, wouldn't it be a good thing if you
23 did know what that meant?

13:15:40

12:45:44

24 **A.** Not if it's a phrase I'd never heard before,
25 no.

13:15:44

13:15:46

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13:15:59 1 Q. So in your job when you're trying to decide
13:16:01 2 what information you need or don't need, if you run
13:16:03 3 across a phrase you've never seen before that's just
13:16:05 4 something you throw out?

13:16:07 5 MR. GOSS: Object to form.

13:16:08 6 Q. I'm trying to understand the reasoning
13:16:09 7 there.

13:16:09 8 A. I don't think I said that.

13:16:11 9 Q. Okay. So what I'm trying to understand is
13:16:12 10 you didn't think it would be important to know what
13:16:15 11 dust spot efficiency was when making decisions on the
13:16:17 12 filter. Do you agree with that or don't agree with
13:16:19 13 that?

13:16:20 14 MR. GOSS: Object to form.

13:16:20 15 A. I guess I disagree with that. I may have
13:16:20 16 known what it meant at the time. I don't know what it
13:16:30 17 means now. All I see is the dust spot...

13:16:30 18 (Interruption by the reporter.)

13:16:31 19 A [REDACTED]

[illegible]

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CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

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Q. I don't want to have to belabor the point, but I want to go specifically to what I was actually asking.

A. Okay.

Q. Which is that it was possible to develop and implement a HEPA filter that did not sacrifice airflow, that could get you into your airflow target if you were willing to spend the money to do it.

MR. GOSS: Object to form, --

MR. BREWER: Objection, foundation.

MR. GOSS: -- assumes facts.

A. I said I don't know that to be fact, because STIREWALT & ASSOCIATES
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13:25:02 1 I need to see -- I would need to see performance
13:25:04 2 curves as far as where all the numbers ended.
13:25:06 3 Q. You sure would. You're absolutely right.
13:25:06 4 Let me --
13:25:14 5 (Discussion off the stenographic record.)
13:25:14 6 A. And cost did not play into it, just to sort
13:25:17 7 of complete your thought.
13:25:18 8 Q. What was that? I'm sorry.
13:25:19 9 A. Cost did not play into it. I do not recall,
13:25:22 10 it was not a key decision making --
13:25:24 11 Q. Stick a pin in that. We'll come back to it.
13:25:24 12 (Exhibit 293 marked for identification.)
13:25:24 13 BY MR. BANKSTON:
13:25:48 14

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

175

13:31:20 1 good airflow, that was going to be more expensive than
13:31:22 2 the filter you were using.
13:31:24 3 MR. GOSS: Object to form.
13:31:28 4 A. I don't agree nor disagree with that. I
13:31:30 5 don't know the cost of the HEPA media compared to the
13:31:32 6 cost of the non-HEPA media. My assumption is that
13:31:35 7 most of it is the labor to assemble and, you know,
13:31:39 8 shoot the plastic parts, not necessarily the cost of
13:31:41 9 the media. But I don't have a cost of billed material
13:31:44 10 before me.
13:31:45 11 Q. You aren't able to disagree with me today
13:31:47 12 that the filter being used in the Bair Hugger is a
13:31:50 13 cheaper filter.
13:31:52 14 MR. GOSS: Object to form.
13:31:52 15 A. I don't know one way or another which filter
13:31:55 16 would be less or more expensive.
13:31:57 17 Q. Okay.
13:31:57 18 (Discussion off the stenographic record.)
13:32:19 19 (Exhibit 295 marked for identification.)
13:32:19 20 BY MR. BANKSTON:
13:32:21 21 Q. Mr. Zgoda, Exhibit 295 is an email --
13:32:33 22 (Discussion off the stenographic record.)
13:32:36 23 BY MR. BANKSTON:
13:32:36 24 Q. [REDACTED]

[illegible]

CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

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13:35:45 **Q.** Okay. Now after --

13:35:47 **2** A few months after the Project Ducky

13:35:49 **3** decision, negotiations began on what would ultimately

13:35:53 **4** become the sale of Arizant to 3M for almost a billion

13:35:56 **5** dollars. You're aware that occurred?

13:35:59 **6** **A.** Well obviously I know the sale occurred.

13:36:01 **7** I'm not privy to anything related to the timing or the

13:36:05 **8** beginning of the negotiations or who was involved in

13:36:07 **9** that. The only time I found about the sale of the

13:36:09 **10** company when it was publicly announced by the 3M press

13:36:12 **11** release, whatever day that was.

13:36:13 **12** **Q.** And that was consummated in 2010; correct?

13:36:16 **13** **A.** That's my recollection. In September 2010,

13:36:17 **14** I think.

13:36:18 **15** **Q.** Okay. Well you and Arizant management

13:36:22 **16** certainly understood that if the company started

13:36:24 **17** making changes to the device that were related to an

13:36:28 **18** infection risk, it would cause people to scrutinize

13:36:31 **19** the Bair Hugger on that issue more closely. You

13:36:34 **20** understood that; right?

13:36:36 **21** **A.** I was not privy to anything dealing with the

13:36:39 **22** sale and so to say I understood that, I'd say no.

13:36:41 **23** **Q.** We're not talking about the sale. I want to

13:36:43 **24** move generally to everything.

13:36:46 **25** **A.** So say it again.
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CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

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13:36:47 **Q.** Is that if you and -- you and people at
13:36:49 **2** Arizant management knew that if you made changes to
13:36:53 **3** the Bair Hugger related to these contamination issues,
13:36:55 **4** it would cause people, anybody outside the company, to
13:36:57 **5** scrutinize the Bair Hugger more closely on that issue.
13:37:00 **6** **A.** I was not part of any discussions related to
13:37:05 **7** that, and that honestly wasn't on my radar.
13:37:07 **8** **Q.** But you --
13:37:07 **9** I mean again I'm not talking about if you
13:37:10 **10** discussed it. You understood that. That is not a
13:37:12 **11** leap of logic that would have been outside your field
13:37:14 **12** of knowledge. You knew that that would happen.
13:37:17 **13** **A.** Well --
13:37:17 **14** MR. GOSS: Object to form.
13:37:17 **15** **A.** -- no. I mean, I wouldn't say I knew it
13:37:19 **16** because I hadn't thought about it or discussed it.
13:37:22 **17** If you frame it up now, in hindsight, would
13:37:24 **18** that have been logical? Yeah. But at the time, no.
13:37:28 **19** It wasn't even a thought of mine.
13:37:31 **20** **Q.** Okay. Looking back now you could see how
13:37:34 **21** people could conclude, if they thought about that
13:37:37 **22** issue, that it would cause more scrutiny of the Bair
13:37:39 **23** Hugger if you made a bunch of design changes relating
13:37:42 **24** to infection.
13:37:42 **25** **A.** Purely speculative people can, you know,

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CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

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13:41:54

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Q.

13:46:21

25

A. Yes.

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CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

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13:46:22

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[REDACTED]

[REDACTED]

[REDACTED]

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CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

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MR. BANKSTON: There we go. Thanks, Peter.

13:52:56

7

BY MR. BANKSTON:

13:52:56

8

Q. Let's talk about --

13:52:57

9

Well first of all, when they said that

13:52:59

10

confidentially we are looking to improve the filter.

13:53:03

11

When they say, confidentially to the people on this

13:53:05

12

email reply, have you ever had situations where you're

13:53:07

13

working on a project in engineering but you're keeping

13:53:10

14

it secret from the rest of the company? Has that ever

13:53:11

15

happened to you?

13:53:14

16

A. Yes. You keep it secret from certain parts

13:53:15

17

of the company.

13:53:16

18

Q. Okay. In other words, there's such a thing

13:53:19

19

called black projects. Have you heard that term be

13:53:22

20

thrown around at Arizant or 3M?

13:53:23

21

A. I have not personally used it myself, but I

13:53:26

22

know what you're talking about, yeah.

13:53:27

23

Q. Okay. In fact, did you know --

13:53:28

24

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CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

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Q. Okay. If someone was to make a claim externally to the company that that filter excluded the vast majority of these .2 micron particles, that wouldn't be an honest claim; correct?

13:53:46

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MR. GOSS: Object to form.

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A. Based solely on that one curve that you

13:54:01

10

showed me where the number looked like it was slightly sub-50 percent.

13:54:05

11

13:54:07

12

Q. Well I don't -- You know, I have that

13:54:08

13

document. I have it, I've seen it plenty of times.

13:54:10

14

This is my day to talk to you. And you're

13:54:12

15

the guy who spent all this time on the 750. You're

13:54:15

16

the -- You're the project lead; correct?

13:54:17

17

A. Not the one curve that you showed me from 2008 or whenever it was.

13:54:19

18

13:54:21

19

Q. Sure. Okay.

13:54:21

20

But what I'm saying, when it came time to

13:54:24

21

put the 750 together and choose a filter for it,

13:54:26

22

you're the project lead of that.

13:54:27

23

A. Yes.

13:54:28

24

Q. And since the inception of this lawsuit

13:54:30

25

alleging airborne contamination you've spent 70 hours

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13:54:33 1 getting ready to come here and testify to me and
13:54:35 2 answer my questions; correct?

13:54:37 3 MR. BREWER: Objection, misstates the
13:54:39 4 record.

13:54:41 5 A. I've estimated the total of 70 hours of time
13:54:44 6 spent between the three depositions discussing
13:54:47 7 documents in the case with various legal counsel.

13:54:50 8 Q. And I'm asking you, aside from what I
13:54:53 9 educated you on today, besides the documents that
13:54:55 10 you've seen from me, --

13:54:56 11 A. Yep.

13:54:57 12 Q. -- can you say, if somebody made the claim
13:55:00 13 external to the company that your filter excludes a
13:55:02 14 vast majority of .2 micron particles, is that honest
13:55:06 15 or is it dishonest?

13:55:09 16 MR. GOSS: Object to form.

13:55:10 17 A. I wouldn't characterize it as honest or
13:55:13 18 dishonest because coming into today -- or -- until I
13:55:16 19 saw that document I don't remember what the efficiency
13:55:17 20 curve of the M20 media was like.

13:55:24 21 Q. Before making that kind of statement, let's
13:55:26 22 say you're going to make a statement to the public
13:55:28 23 about excludes the vast majority of .2 micron
13:55:32 24 particles. That's the kind of statement that should
13:55:33 25 be verified with data before it's made to the public;

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CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

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13:58:44

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14:03:17 21
14:03:19 22
14:03:20 23
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14:03:25 25

Q. Well you did nothing to validate the effect of the 750 on operating room airflow when you developed it; right?

A. That is accurate.

Q. Okay. And so let's go away from your development days to now sitting here in this room in front of this jury.

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14:03:27 **1** You can now acknowledge that that change
 14:03:29 **2** that you made in airflow may be a cause of the
 14:03:32 **3** increased particulate counts being observed in
 14:03:34 **4** studies.
 14:03:35 **5** MR. GOSS: Object to form.
 14:03:36 **6** MR. BREWER: Objection, foundation.
 14:03:39 **7** **A.** And I don't think I really have the
 14:03:42 **8** background in those studies or the testing that was
 14:03:43 **9** done and how they did it, and so I think any opinion I
 14:03:47 **10** would interject is not of great value.
 14:03:51 **11** **Q.** If you had to do it over again, if we could
 14:03:55 **12** turn back the hands of time and go back to developing
 14:03:58 **13** the 750 again, you'd want to make sure these tests
 14:04:00 **14** were done; wouldn't you?
 14:04:04 **15** **A.** A lot of things are obvious in hindsight,
 14:04:07 **16** but given where we're sitting today, yes, it probably
 14:04:10 **17** would have been prudent to do them. But they were not
 14:04:14 **18** on my radar to do, so.
 14:04:16 **19** **Q.** As the person who was responsible for the
 14:04:18 **20** safety and to make sure all the val -- verification
 14:04:20 **21** testing had been done, that hadn't --
 14:04:21 **22** **A.** Once again --
 14:04:22 **23** **Q.** I'm sorry. I gotta finish my question
 14:04:25 **24** before. She can only take down one of us at a time.
 14:04:27 **25** As the person who was being responsible for
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14:04:29 **1** the safety and verification testing, you could only
 14:04:31 **2** verify what had been put on your list to verify;
 14:04:34 **3** correct?
 14:04:34 **4** **A.** Yes. I'm sorry.
 14:04:35 **5** I would say that was accurate. It was my
 14:04:37 **6** responsibility to make sure that all the verification
 14:04:39 **7** testing that was identified by the team was executed
 14:04:42 **8** satisfactorily.
 14:04:42 **9** **Q.** And if that safety issue wasn't put on your
 14:04:45 **10** radar by somebody, it wasn't going to get checked.
 14:04:50 **11** **A.** I would say that's likely, yes.
 14:04:53 **12** **Q.** Who should have put it on the list?
 14:04:59 **13** **A.** That would just be conjecture on my part.
 14:05:05 **14** I'm not sure I could say who would be responsible for
 14:05:07 **15** that.
 14:05:09 **16** **Q.** I've sat in this room many hours and I've
 14:05:12 **17** talked to many of your colleagues, and I have been
 14:05:14 **18** looking for a long time for the person who can tell me
 14:05:17 **19** who's responsible for getting all of the testing done
 14:05:19 **20** on the 750, making sure that the right things were
 14:05:23 **21** tested. And if there is anything you can tell me
 14:05:25 **22** today about who that person might have been, is there
 14:05:28 **23** any information that you can have that can lead me to
 14:05:31 **24** that right person?
 14:05:32 **25** MR. GOSS: Object to the preamble.
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14:05:34 **1** MR. BANKSTON: I'll allow it.
 14:05:35 **2** MR. BREWER: Objection, foundation.
 14:05:37 **3** **A.** I'm sorry. Can you either rephrase it or
 14:05:41 **4** repeat it based on their objections?
 14:05:42 **5** **Q.** Yeah.
 14:05:43 **6** I've been hoping for a long time to find out
 14:05:45 **7** who that person is. You know what I mean when I say
 14:05:47 **8** "who that person is."
 14:05:49 **9** **A.** Yep.
 14:05:49 **10** **Q.** Is there anything you can tell that tells me
 14:05:51 **11** who the person is who should have put that information
 14:05:53 **12** on the list or should have come up with the things
 14:05:55 **13** that needed to be tested on the Bair Hugger?
 14:05:58 **14** **A.** I'm not sure who that individual would be,
 14:06:01 **15** and once again, it's a -- you know, it's a team
 14:06:04 **16** effort, every department is represented. As part of
 14:06:07 **17** the effort we identified whatever testing needed to be
 14:06:10 **18** done to verify and validate the device, and we did
 14:06:12 **19** that.
 14:06:13 **20** Now whether you say it's, you know,
 14:06:15 **21** regulatory because they knew what was filed with the
 14:06:18 **22** FDA or, you know, clinical because of the
 14:06:21 **23** applications. I'm not equipped to say it was one
 14:06:24 **24** person.
 14:06:28 **25** **Q.** Sometime after you left 3M someone contacted
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14:06:32 **1** you to let you know about the existence of a lawsuit
 14:06:36 **2** involving the Bair Hugger; right?
 14:06:38 **3** **A.** I don't know about the timing of that. I
 14:06:42 **4** don't know if I knew about the existence of the
 14:06:44 **5** lawsuit before I left or not.
 14:06:47 **6** **Q.** Okay. I see what you're saying. Okay.
 14:06:49 **7** But somewhere in the recent timeframe you
 14:06:53 **8** were informed that there was a lawsuit with the Bair
 14:06:55 **9** Hugger.
 14:06:55 **10** **A.** Yes.
 14:06:56 **11** **Q.** Who was that who told you; do you remember?
 14:06:59 **12** **A.** I don't recall. I think it was somebody
 14:07:01 **13** internal to 3M and not out of the blue, but I can't
 14:07:06 **14** say definitively who told me.
 14:07:07 **15** **Q.** Okay. And at that time you negotiated an
 14:07:09 **16** agreement with a law firm in which they would pay to
 14:07:12 **17** act you as their consultant.
 14:07:15 **18** **A.** I had an LCA with --
 14:07:18 **19** So when I left the company 3M made the law
 14:07:24 **20** firm available to me as part of the litigation
 14:07:28 **21** arrangement.
 14:07:30 **22** **Q.** No. What I'm asking is you negotiated an
 14:07:34 **23** agreement with that law firm in which that law firm
 14:07:36 **24** would pay you money to consult with them on the
 14:07:38 **25** lawsuit.
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14:07:39 **1** **A.** I negotiated the dollar amount but not -- I
 14:07:41 **2** didn't negotiate the need for the existence of the
 14:07:44 **3** LCA. It was basically proposed and given to me and
 14:07:47 **4** the only thing that's the subject of negotiation was
 14:07:49 **5** the dollar amount.
 14:07:50 **6** **Q.** Let's make that then to fit more with what
 14:07:53 **7** you're saying. And that is that you executed an
 14:07:54 **8** agreement with a law firm in which they would pay you
 14:07:56 **9** to act as their consultant.
 14:08:00 **10** **A.** It might be semantics, but I executed an
 14:08:03 **11** agreement to meet with them to discuss the specifics
 14:08:05 **12** of the case under what was called an LCA. And so
 14:08:10 **13** whether the term "consultant" is what I, you know,
 14:08:13 **14** thought or inferred, I don't know. But yes, I signed
 14:08:16 **15** an agreement with them to meet with them and be
 14:08:18 **16** compensated for my time as we discussed specifics of
 14:08:21 **17** the case.
 14:08:24 **18** **Q.** You testified regarding these matters on two
 14:08:26 **19** prior occasions; right?
 14:08:27 **20** **A.** I believe so, yes.
 14:08:28 **21** **Q.** The first time you testified you received
 14:08:30 **22** \$150 an hour for your services to the defendants' law
 14:08:34 **23** firm.
 14:08:34 **24** **A.** I believe that to be accurate, and I'll take
 14:08:36 **25** your word that that's actually what's in there.

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14:08:38 **1** **Q.** Okay. Then you testified a second time, and
 14:08:41 **2** the second time you asked for \$300 an hour to keep
 14:08:44 **3** doing it.
 14:08:45 **4** **A.** I believe that's what I asked for. I know
 14:08:50 **5** that's not what we settled on. I think it was two
 14:08:54 **6** hun -- I don't remember the dollar amount.
 14:08:55 **7** **Q.** Okay. And I believe, when asked about how
 14:08:57 **8** you got to that 300 figure you said you were aware of
 14:09:01 **9** people who had been medical device consultants who had
 14:09:04 **10** been paid \$200 an hour before. You knew that that was
 14:09:07 **11** something that had happened.
 14:09:08 **12** **A.** What I recall saying is that the first \$150
 14:09:11 **13** was based on my experience as far as what I paid
 14:09:15 **14** consultants or contractors to work in the medical
 14:09:17 **15** device industry, but given the fact that I was in a
 14:09:19 **16** new job, I was more deeply integrated into it, I was
 14:09:22 **17** more important to it and my time was at more of a
 14:09:27 **18** premium, I felt that my time was of more value to me.
 14:09:31 **19** **Q.** Okay. So let me make this clear at the time
 14:09:33 **20** you asked for that \$300 an hour. At that time you did
 14:09:36 **21** not make \$200 an hour.
 14:09:38 **22** **A.** Myself?
 14:09:39 **23** **Q.** You, yourself.
 14:09:40 **24** **A.** Correct.
 14:09:41 **25** **Q.** Okay. But you had known of people that you

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14:09:43 **1** had paid \$200 an hour to do medical device consulting.
 14:09:47 **2** **A.** Hundred and fifty to 200, yeah.
 14:09:49 **3** **Q.** So you just took that and added an extra
 14:09:53 **4** hundred and hundred and fifty above it and that was
 14:09:53 **5** your figure, 300.
 14:09:54 **6** **A.** It was part of the negotiations, yes.
 14:09:56 **7** **Q.** And 300, you asked for that not because it
 14:09:59 **8** has a direct relationship to your actual pay.
 14:10:03 **9** **A.** Correct.
 14:10:04 **10** **Q.** You wanted them to give you something more
 14:10:06 **11** than what your usual salary would be.
 14:10:11 **12** **A.** I wanted them to give me more than they had
 14:10:13 **13** given me previously because I felt my time was more
 14:10:16 **14** valuable.
 14:10:16 **15** **Q.** If you had not been --
 14:10:16 **16** **A.** More -- Sorry.
 14:10:17 **17** It was more of an inconvenience to me to --
 14:10:19 **18** to spend the time discussing the case.
 14:10:22 **19** **Q.** So you were going to need a financial
 14:10:24 **20** incentive in order to balance out that inconvenience.
 14:10:29 **21** **MR. BREWER:** Object. I think it misstates
 14:10:31 **22** the testimony.
 14:10:33 **23** **A.** I had more time to make up so it was a
 14:10:36 **24** greater inconvenience to make time to accommodate them
 14:10:39 **25** and so, yeah, I thought my time was worth more than it

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14:10:44 **1** was previously.
 14:10:45 **2** **Q.** Okay. So the purpose of this additional
 14:10:47 **3** financial inducement is to make up for the additional
 14:10:51 **4** inconvenience that you would have in your new
 14:10:52 **5** position?
 14:10:55 **6** **A.** Yes, because I had a day job I had to, you
 14:10:58 **7** know, continue to do.
 14:10:59 **8** **Q.** If you had not been offered these payments
 14:11:01 **9** it is quite likely you would have not met with these
 14:11:04 **10** lawyers and talked to them about testimony.
 14:11:06 **11** **A.** I don't think that's accurate. I may not
 14:11:09 **12** have spent as much time as I did, but I held no
 14:11:13 **13** animosity to 3M, and so I -- I probably wouldn't have
 14:11:18 **14** -- I mean I wouldn't have cut them off entirely, but
 14:11:20 **15** I'm not sure I would have spent as much time as I did,
 14:11:24 **16** given the compensation at the time.
 14:11:26 **17** **Q.** Well I want to remember back last year when
 14:11:28 **18** you testified in the Johnson matter.
 14:11:29 **19** Do you remember saying that if you had not
 14:11:32 **20** been offered these payments, it's quite likely you
 14:11:36 **21** would not have met with these lawyers and helped them
 14:11:38 **22** with this testimony?
 14:11:39 **23** **A.** I don't recall saying that.
 14:11:40 **24** **Q.** Okay. Let me show you something really
 14:11:42 **25** quick. Okay. Let's --

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14:11:50 **1** Oh, you have a copy in front of you. That's
 14:11:52 **2** right.
 14:11:52 **3** **A.** Okay.
 14:11:52 **4** **Q.** So what I'd like you to do is you'll see
 14:11:54 **5** that there are pages here. If you can go to 107.
 14:11:58 **6** **A.** I'm sorry, hundred?
 14:12:00 **7** **Q.** Hundred and seven.
 14:12:03 **8** **A.** Okay.
 14:12:04 **9** **Q.** And at 107 I'd like you to start at line 16.
 14:12:08 **10** Do you see line 16 on 107?
 14:12:10 **11** **A.** Yes.
 14:12:10 **12** **Q.** And the question that was posed to you:
 14:12:13 **13** "Would you have consulted for
 14:12:14 **14** Greenberg Traurig for no fee?"
 14:12:17 **15** And your answer was:
 14:12:18 **16** "I would have been here... -- I
 14:12:20 **17** would have been here today at the
 14:12:21 **18** deposition for no fee, but it's
 14:12:24 **19** quite likely I would have not met
 14:12:25 **20** with them nor spent the time
 14:12:27 **21** reviewing the documents."
 14:12:28 **22** You stand by that testimony today; right?
 14:12:32 **23** **A.** I stand by the fact that apparently I said
 14:12:34 **24** that at my last deposition, yes.
 14:12:36 **25** **Q.** What does that mean? Does that mean that's
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14:12:38 **1** not --
 14:12:38 **2** What about my question, though? Do you
 14:12:40 **3** stand by the testimony?
 14:12:47 **4** **A.** I think what I said today is probably more
 14:12:49 **5** likely the correct answer for lack of a -- for lack of
 14:12:52 **6** a better phrase of, I mean I definitely wouldn't have
 14:12:55 **7** been as accommodating as I was, but whether I would
 14:12:57 **8** have not met at all. I likely would have given them
 14:13:02 **9** some time.
 14:13:03 **10** **Q.** Okay. Well when you were appearing at that
 14:13:05 **11** deposition you were being paid.
 14:13:08 **12** **A.** I was being --
 14:13:09 **13** Yes. I was being compensated for my time.
 14:13:11 **14** **Q.** Okay. And then after that deposition do you
 14:13:14 **15** remember being sent a copy of this deposition
 14:13:16 **16** transcript?
 14:13:16 **17** **A.** Yes.
 14:13:17 **18** **Q.** And then you were actually paid additional
 14:13:20 **19** money to review this entire transcript, check it for
 14:13:22 **20** accuracy and make any changes to the transcript that
 14:13:24 **21** needed to be made; right?
 14:13:24 **22** **A.** Yes.
 14:13:25 **23** **Q.** This is not something that you changed at
 14:13:27 **24** that time when you were being paid to do that.
 14:13:29 **25** **A.** I would assume that based on what's in front
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14:13:31 **1** of me, yes.
 14:13:33 **2** **Q.** Okay. You said you were going to bill for
 14:13:37 **3** about 20 hours in the Johnson case. Do you remember
 14:13:40 **4** that?
 14:13:44 **5** **A.** I think I said the accumulation between all
 14:13:46 **6** of them was, you know, 20 to 30 hours of -- you know,
 14:13:49 **7** each one. But I don't remember exactly what it was in
 14:13:51 **8** the Johnson case, but I had, you know, invoice and
 14:13:54 **9** documentation showing what it was, but.
 14:13:55 **10** **Q.** Okay. So we had 20 hours or so,
 14:13:57 **11** approximately, in the one case you testified in.
 14:13:59 **12** **A.** Yeah.
 14:13:59 **13** **Q.** You testified in another one for another 20
 14:14:02 **14** hours. Is that what you actually billed to 3M or your
 14:14:05 **15** lawyers or whoever it was?
 14:14:06 **16** **A.** I would have to look and see what the
 14:14:08 **17** numbers are. It was in the 20 to 30 range I believe,
 14:14:11 **18** and I could produce the invoices, but I don't remember
 14:14:13 **19** the exact hour amounts.
 14:14:14 **20** **Q.** You didn't come here today prepared to
 14:14:16 **21** testify about the amounts that the defendant or their
 14:14:20 **22** lawyers had given you in connection with testimony?
 14:14:22 **23** **A.** No.
 14:14:22 **24** **Q.** Did you feel that wasn't important?
 14:14:28 **25** **A.** It just didn't dawn on me to look. I wasn't
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14:14:31 **1** sure the number of hours would be explicitly relevant.
 14:14:34 **2** I thought the bigger point of discussion would be just
 14:14:36 **3** the existence of the agreement and the fact that I was
 14:14:38 **4** compensated for my time.
 14:14:40 **5** **Q.** Right. And you know that the issue of what
 14:14:42 **6** you were paid has become a matter of some controversy
 14:14:45 **7** in this case?
 14:14:50 **8** MR. GOSS: Object to form.
 14:14:52 **9** **A.** I knew --
 14:14:52 **10** (Interruption by the reporter.)
 14:14:53 **11** **A.** I knew, when the cases were consolidated
 14:14:55 **12** here and different legal teams started participating
 14:14:59 **13** in the process, yeah, there were discussions as far as
 14:15:01 **14** the previous LCAs and level of compensation causing
 14:15:06 **15** issues, for lack of a better word.
 14:15:08 **16** **Q.** Well at some point those first lawyers, they
 14:15:10 **17** stopped being your lawyers.
 14:15:12 **18** **A.** Correct.
 14:15:12 **19** **Q.** Those people don't represent you any more.
 14:15:14 **20** **A.** Correct.
 14:15:14 **21** **Q.** Okay. Did you fire them?
 14:15:16 **22** **A.** No.
 14:15:18 **23** **Q.** So someone else fired them.
 14:15:22 **24** **A.** Or they quit. I mean, I was not involved in
 14:15:25 **25** the decision and process to remove them.
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14:15:29 **1** **Q.** Yeah. That's not something you're --
 14:15:30 **2** You're not in control over that; are you?
 14:15:34 **3** **A.** No.
 14:15:35 **4** **Q.** So if someone -- if someone else doesn't
 14:15:40 **5** like what your lawyer is doing, they can just fire
 14:15:43 **6** them without your knowledge.
 14:15:48 **7** MR. BREWER: Objection, misstates the
 14:15:49 **8** testimony.
 14:15:53 **9** **A.** Yeah. I'd go back to what I said is, I
 14:15:55 **10** mean, somehow they were removed. I don't know who did
 14:15:57 **11** it, whether they did it themselves or whether 3M did
 14:16:00 **12** it, but I played no role.
 14:16:01 **13** **Q.** It all happened without your knowledge.
 14:16:03 **14** **A.** Without my prior knowledge.
 14:16:05 **15** **Q.** Right. So your legal counsel, people who
 14:16:08 **16** you had signed an agreement with to represent your
 14:16:11 **17** interests, were suddenly no longer your counsel and
 14:16:14 **18** through not any control of your own. So that's a bit
 14:16:19 **19** weird; right?
 14:16:21 **20** MR. GOSS: Object to form.
 14:16:22 **21** MR. BREWER: Object to the form.
 14:16:23 **22** **A.** Having never gone through this, I have no
 14:16:25 **23** idea how common or uncommon any of this is.
 14:16:28 **24** **Q.** I'm just saying as you as a person is going
 14:16:30 **25** to have their rights protected, apparently, by an
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14:16:32 **1** attorney that you've agreed to let them represent you,
 14:16:37 **2** don't you find it weird that suddenly they weren't
 14:16:40 **3** your lawyers and you had no say over that?
 14:16:42 **4** **A.** No. I didn't find it odd. I mean, if there
 14:16:44 **5** had been nobody to replace them and I was here on my
 14:16:46 **6** own I would have found that more odd, but not
 14:16:50 **7** necessarily the selection of who it is.
 14:16:52 **8** **Q.** In other words, once you lost those lawyers
 14:16:54 **9** you didn't go out and find new lawyers, some new
 14:16:57 **10** lawyers were given to you.
 14:16:58 **11** **A.** Well new teams approached me to talk about
 14:17:02 **12** their ability or desire to represent me.
 14:17:07 **13** **Q.** That would include the lawyers of the Brewer
 14:17:09 **14** firm.
 14:17:11 **15** **A.** Yes. Mr. Fresch -- Fresch's firm.
 14:17:15 **16** **Q.** Okay. I just want to make sure I understand
 14:17:16 **17** this, okay? So you got three lawyers --
 14:17:16 **18** **A.** Yeah.
 14:17:18 **19** **Q.** -- sitting next to you.
 14:17:19 **20** This one represents you.
 14:17:20 **21** **A.** Yes.
 14:17:20 **22** **Q.** That one represents you.
 14:17:22 **23** **A.** Yes.
 14:17:22 **24** **Q.** Does that one represent you?
 14:17:23 **25** **A.** My understanding is that gentleman
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14:17:25 **1** represents 3M.
 14:17:27 **2** **Q.** Does he represent you?
 14:17:29 **3** **A.** Not based on my understanding, no.
 14:17:32 **4** **Q.** Okay. And so when we talk about the lawyers
 14:17:35 **5** who do represent you, they contacted you; right?
 14:17:38 **6** **A.** The firm contacted me, not these two
 14:17:41 **7** particular individuals.
 14:17:42 **8** **Q.** Perfect. Okay.
 14:17:42 **9** In other words, you didn't pick up the phone
 14:17:44 **10** and go find out where the Brewer was located and call
 14:17:46 **11** them up.
 14:17:47 **12** **A.** Correct. I did not.
 14:17:48 **13** **Q.** Okay. They called you, they offered you
 14:17:50 **14** free representation.
 14:17:54 **15** **A.** Yeah. Yeah. They offered to represent me,
 14:17:56 **16** yes.
 14:17:56 **17** **Q.** Any --
 14:17:57 **18** Did you have any kind of meeting or sit-down
 14:17:59 **19** consultation with these lawyers when they weren't your
 14:18:01 **20** lawyers? Like a meeting where they weren't
 14:18:04 **21** representing you and y'all talked about the case?
 14:18:07 **22** **A.** No. I mean, I did not meet with them prior
 14:18:09 **23** to one of them reaching out to me by phone basically
 14:18:13 **24** saying they were the new counsel assigned to represent
 14:18:17 **25** me.
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14:18:17 **1** **Q.** So the first contact you had with them was
 14:18:20 **2** their offer of free representation.
 14:18:22 **3** **A.** I don't remember if that was part of the
 14:18:23 **4** discussion, but I remember getting a voicemail from
 14:18:25 **5** them reaching out saying, you know, who they were and
 14:18:27 **6** they wanted me to call them.
 14:18:29 **7** **Q.** Okay. Do you have any agreements with these
 14:18:30 **8** lawyers?
 14:18:31 **9** **A.** Not written.
 14:18:32 **10** **Q.** Okay.
 14:18:33 **11** **A.** Verbal.
 14:18:34 **12** **Q.** And that tells me that there is an
 14:18:35 **13** agreement; right?
 14:18:36 **14** **A.** It's a verbal understanding. Whether it's a
 14:18:38 **15** legal agreement or not, I don't know.
 14:18:40 **16** **Q.** Hmm. Okay.
 14:18:41 **17** So when you were testifying before and you
 14:18:44 **18** had an agreement with counsel, you wrote a legal
 14:18:47 **19** document that you signed your name to. You remember
 14:18:48 **20** that?
 14:18:49 **21** **A.** Yeah. The LCA? Yeah.
 14:18:51 **22** **Q.** Okay. And it defined your obligations to
 14:18:53 **23** your lawyers, and it defined your lawyers's
 14:18:56 **24** obligations to you. You remember that?
 14:18:59 **25** **A.** I don't remember explicitly what was on the
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14:19:01 **1** document, but I remember signing it.
 14:19:02 **2 Q.** You don't have anything like that now.
 14:19:04 **3 A.** No.
 14:19:07 **4 Q.** Do you know the value of the services
 14:19:08 **5** they're offering you for free?
 14:19:12 **6 A.** Definitely, no.
 14:19:14 **7 Q.** You're going to pay taxes on it, though;
 14:19:16 **8** right?
 14:19:19 **9 A.** Oh --
 14:19:19 **10 Q.** You.
 14:19:19 **11 A.** -- my compensation for my time, yes. I'll
 14:19:22 **12** get a tax form on it.
 14:19:24 **13 Q.** I'm talking about income from any source.
 14:19:25 **14** You're being given a very large gift in this case.
 14:19:28 **15** You understand that; right?
 14:19:29 **16** MR. GOSS: Object to the form.
 14:19:30 **17** MR. BREWER: Objection, foundation.
 14:19:31 **18 A.** I'm not sure it's a gift.
 14:19:33 **19 Q.** It's given to you free, gratuitously. You
 14:19:36 **20** don't have to pay for it.
 14:19:37 **21 A.** Correct.
 14:19:38 **22 Q.** Okay. You understand if you were given
 14:19:40 **23** large sums in value, things of value were given to you
 14:19:43 **24** gratuitously, that over a certain amount you have to
 14:19:46 **25** pay federal income tax on that; right?

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14:19:49 **1** MR. BREWER: Objection, foundation.
 14:19:50 **2 A.** Don't know in this case.
 14:19:52 **3 Q.** So in other words, for the last years in
 14:19:54 **4** which you were given free representation, did you pay
 14:19:56 **5** taxes on the free representation?
 14:19:58 **6 A.** I pay taxes on the compensation I received.
 14:20:03 **7 Q.** All right. But that's not the question I
 14:20:04 **8** was asking. All right.
 14:20:05 **9** So the question I asked was: Did you pay
 14:20:07 **10** taxes on the free representation you were given?
 14:20:09 **11 A.** No. I was given no tax documents related to
 14:20:12 **12** that.
 14:20:13 **13 Q.** Okay. Now with the prior lawyers you had a
 14:20:17 **14** written agreement with respect to confidentiality.
 14:20:21 **15** You know what that -- what I mean by that word?
 14:20:24 **16 A.** Well I understand confidentiality, but once
 14:20:25 **17** again I don't remember if that was being part of the
 14:20:27 **18** document or not.
 14:20:28 **19 Q.** Well sure, there was in that document, do
 14:20:30 **20** you remember the section that talked about your
 14:20:32 **21** confidentiality obligations, things you could or could
 14:20:35 **22** not tell me or the rest of the world relating to this
 14:20:37 **23** case?
 14:20:37 **24** MR. BREWER: Objection, foundation.
 14:20:38 **25 A.** Not explicitly, no. I would need to see it

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14:20:41 **1** in front of me to remember the details of what was --
 14:20:43 **2 Q.** All right. Unfortunately I don't have a
 14:20:44 **3** copy of it printed out. But I'm wondering, do you
 14:20:47 **4** have just no memory of there being a confidentiality
 14:20:50 **5** clause in your agreement?
 14:20:51 **6 A.** I have said I don't recall what was actually
 14:20:53 **7** on the document that I signed because I haven't
 14:20:55 **8** reviewed it in, whatever, two plus years, whatever the
 14:20:58 **9** time has been.
 14:20:59 **10 Q.** Yeah. Okay.
 14:21:06 **11** (Discussion off the stenographic record.)
 14:21:06 **12** THE VIDEOGRAPHER: Off video.
 14:21:11 **13** (Recess taken from 2:21 to 2:27 p.m.)
 14:27:28 **14** BY MR. BANKSTON:
 14:27:32 **15 Q.** Mr. Zgoda, we cut off talking about
 14:27:34 **16** confidentiality and agreements with respect to that.
 14:27:38 **17** If -- If you had to figure out what you were allowed
 14:27:42 **18** to talk about, what you could or could not talk about
 14:27:44 **19** with respect to me, the whole world, you don't have a
 14:27:47 **20** document you can look at that can tell you; do you?
 14:27:51 **21 A.** Correct.
 14:27:52 **22 Q.** If I want to know what your confidentiality
 14:27:54 **23** agreements are, there's nothing you can give me, I
 14:27:56 **24** just have to hear it from your mouth; right?
 14:27:59 **25 A.** Correct.

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14:28:00 **1 Q.** Okay. Do you understand we've been looking
 14:28:02 **2** at confidential documents today?
 14:28:05 **3 A.** Yes.
 14:28:06 **4 Q.** And you see how they say "3M Confidential"
 14:28:08 **5** at the bottom of them; correct?
 14:28:11 **6 A.** They say "confidential," yes.
 14:28:13 **7 Q.** Yeah. Have you ever signed any kind of
 14:28:14 **8** order relating -- any kind of agreement relating not
 14:28:17 **9** to your testimony, but just to the confidentiality of
 14:28:20 **10** those documents?
 14:28:25 **11 A.** Not that I recall, no.
 14:28:28 **12 Q.** Now you'll acknowledge that if you once had
 14:28:30 **13** a written agreement with respect to confidentiality
 14:28:33 **14** and now you no longer have any kind of written
 14:28:36 **15** agreement on these issues, you would acknowledge that
 14:28:38 **16** that could maybe make it difficult for you to know
 14:28:40 **17** exactly what you can and cannot share with me.
 14:28:44 **18 A.** Can you say that one more time, please?
 14:28:46 **19 Q.** Sure.
 14:28:47 **20** You used to have --
 14:28:49 **21** In a situation where you used to have a
 14:28:50 **22** firmly defined set of confidentiality obligations
 14:28:53 **23** written in an agreement, and now you have a new
 14:28:56 **24** agreement with new counsel where there is no written
 14:29:00 **25** agreement for that, you'll agree that that might make

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14:29:03 **1** it difficult for you to exactly know what you are
 14:29:05 **2** allowed to or not to share with me.
 14:29:08 **3** **A.** Yes. I would use their guidance here in the
 14:29:11 **4** deposition to -- as far as what I shouldn't -- or as
 14:29:16 **5** far as what I shouldn't comment on, I should say.
 14:29:18 **6** **Q.** Okay. Do you understand whether there's a
 14:29:22 **7** joint representation agreement between you and 3M?
 14:29:27 **8** **A.** No.
 14:29:28 **9** MR. BREWER: Objection --
 14:29:29 **10** **Q.** That's not something you have an informed
 14:29:31 **11** understanding about, whether that exists or not.
 14:29:33 **12** **A.** Correct.
 14:29:34 **13** **Q.** Okay. You do understand that these lawyers
 14:29:37 **14** who represent you, that they have a duty to you, and
 14:29:41 **15** they also have a simultaneous duty to the people
 14:29:44 **16** paying them, whoever that might be.
 14:29:47 **17** MR. BREWER: Objection.
 14:29:50 **18** **A.** Hadn't thought about it. I thought about it
 14:29:54 **19** in the context of them having a duty to me since they
 14:29:57 **20** have been assigned to me.
 14:29:59 **21** **Q.** But you do understand that they also have
 14:30:01 **22** duties to whoever's paying them.
 14:30:02 **23** **A.** I understand --
 14:30:03 **24** MR. BREWER: Objection, foundation.
 14:30:05 **25** **A.** I understand they're being paid by someone
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14:30:07 **1** else, but hadn't really thought about their duties to
 14:30:09 **2** them other than receiving compensation.
 14:30:11 **3** **Q.** Who's paying them?
 14:30:13 **4** **A.** My understanding is that 3M will be paying
 14:30:14 **5** them.
 14:30:15 **6** **Q.** Okay. Do you --
 14:30:16 **7** How have you confirmed that?
 14:30:18 **8** **A.** I have not confirmed it.
 14:30:20 **9** **Q.** Okay. Do you have any reason that you're
 14:30:30 **10** assuming that 3M's the one who's the benefactor here,
 14:30:34 **11** who's paying for all of this?
 14:30:37 **12** **A.** Just the fact that I can't imagine them
 14:30:41 **13** doing it for free and I'm not paying them, so I'm
 14:30:44 **14** assuming it's 3M.
 14:30:46 **15** **Q.** Okay. So you have you, who they're going to
 14:30:49 **16** be representing your interest, and another party who's
 14:30:51 **17** paying the money. Okay. You understand that that's
 14:30:53 **18** the situation that's occurring right now.
 14:30:55 **19** **A.** Yes.
 14:30:57 **20** **Q.** Okay. Do you have an informed understanding
 14:30:59 **21** of the risks and the alternatives to that kind of
 14:31:03 **22** joint employment?
 14:31:06 **23** **A.** No.
 14:31:06 **24** **Q.** Okay. Do you have an informed understanding
 14:31:10 **25** of to what extent confidences will be shared between
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14:31:14 **1** these two entities, between you and 3M?
 14:31:17 **2** **A.** Ask that one more time. Sorry.
 14:31:18 **3** **Q.** Yeah. Sure.
 14:31:19 **4** Do you have an extent of an understanding,
 14:31:22 **5** the extent of the confidences that will be shared
 14:31:25 **6** between you and 3M?
 14:31:26 **7** MR. BREWER: Well hold on. Let me -- To
 14:31:31 **8** the -- To the extent that you would answer that
 14:31:35 **9** question and reveal conversations that you had with
 14:31:38 **10** lawyers, either from my firm or some other place,
 14:31:42 **11** that were intended to be confidential, I direct you
 14:31:48 **12** not to reveal those conversations. To the extent
 14:31:50 **13** that you can answer it otherwise, you're free to do
 14:31:54 **14** so.
 14:31:56 **15** **A.** You know the routine.
 14:31:58 **16** **Q.** Do you remember the question? Yeah.
 14:31:59 **17** **A.** Sorry.
 14:32:00 **18** **Q.** All right. Do --
 14:32:00 **19** And again, I'll echo Mr. Brewer's
 14:32:03 **20** instructions to you, which is I don't want to know
 14:32:05 **21** anything a lawyer told you.
 14:32:06 **22** **A.** Okay.
 14:32:07 **23** **Q.** Okay. I don't want to know anything that
 14:32:08 **24** you asked for in legal advice. You know that certain
 14:32:11 **25** conversations, those are like you and your priest.
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14:32:15 **1** But what I do want to know, do you have an
 14:32:17 **2** informed understanding of the extent to which
 14:32:20 **3** confidences will be shared between you and 3M?
 14:32:24 **4** MR. BREWER: I think that's a "yes" or a
 14:32:25 **5** "no."
 14:32:27 **6** THE WITNESS: I'm sorry?
 14:32:27 **7** MR. BREWER: You can answer that "yes" or
 14:32:32 **8** "no."
 14:32:32 **9** **A.** No.
 14:32:33 **10** **Q.** Okay. Do you know what's going to occur if
 14:32:36 **11** any client withdraws from this joint agreement?
 14:32:43 **12** **A.** Definitely? No.
 14:32:47 **13** **Q.** Do you understand what it means for you and
 14:32:48 **14** 3M to develop a conflict of interest?
 14:32:54 **15** **A.** I understand the concept of conflict of
 14:32:56 **16** interest obviously, but in this case I hadn't thought
 14:33:00 **17** or not aware of a conflict of interest between me and
 14:33:03 **18** 3M.
 14:33:03 **19** **Q.** In other words, when you formed this
 14:33:05 **20** attorney-client relationship you did not do so with an
 14:33:08 **21** informed understanding of the potential for conflicts
 14:33:11 **22** of interest between you and 3M.
 14:33:14 **23** MR. BREWER: My prior instruction about
 14:33:16 **24** revealing conversations you had with me or anybody in
 14:33:21 **25** my -- anyone else at our firm or any other lawyer you
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14:33:26 **1** might have spoken with should remain confidential.
 14:33:29 **2** If you have some answer that you can give without
 14:33:32 **3** revealing confidences you had with lawyers that were
 14:33:36 **4** pursuant to the rendition of legal advice, then
 14:33:40 **5** you're free to do so.
 14:33:43 **6** **Q.** One more time?
 14:33:44 **7** **A.** I'm sorry. Please.
 14:33:46 **8** MR. BANKSTON: Actually -- Can I actually
 14:33:48 **9** get that one read back? I haven't tried to do that
 14:33:51 **10** to you too much today if I could avoid it.
 14:34:14 **11** (Record read by the reporter.)
 14:34:15 **12** **A.** I would say --
 14:34:16 **13** MR. BREWER: In addition I have an
 14:34:17 **14** objection to the form. I think it assumes facts not
 14:34:20 **15** in evidence.
 14:34:20 **16** **A.** I would say I did not have an informed
 14:34:22 **17** understanding.
 14:34:24 **18** **Q.** Do you know what will happen if a conflict
 14:34:27 **19** arises that precludes this continuing representation?
 14:34:30 **20** MR. BREWER: The same instruction as
 14:34:32 **21** before.
 14:34:32 **22** **A.** I do not.
 14:34:36 **23** **Q.** Okay. Could you fire these lawyers and go
 14:34:38 **24** hire your own lawyer?
 14:34:43 **25** **A.** I hadn't really thought about it, but I
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14:34:44 **1** assume I would be allowed to if I chose to.
 14:34:47 **2** **Q.** No guarantee of that, though, at this point
 14:34:50 **3** is what you're telling me?
 14:34:51 **4** **A.** Definitive guarantee, no, because it's not
 14:34:54 **5** an idea I've broached or thought about.
 14:34:55 **6** **Q.** If you wanted to go get your own lawyer to
 14:34:58 **7** protect your interest, is your benefactor going to pay
 14:35:00 **8** for it?
 14:35:01 **9** MR. BREWER: Objection to the form. I
 14:35:03 **10** think it assumes a fact that's not in evidence.
 14:35:03 **11** **A.** I don't know.
 14:35:10 **12** **Q.** You don't know if they'll pay for it.
 14:35:14 **13** **A.** (Shaking head.)
 14:35:18 **14** THE REPORTER: Your answer, please?
 14:35:19 **15** THE WITNESS: I said "I don't know."
 14:35:21 **16** THE REPORTER: I'm sorry. I didn't hear
 14:35:22 **17** you.
 14:35:23 **18** THE WITNESS: Okay. All right. At least I
 14:35:26 **19** meant to say that.
 14:35:30 **20** **Q.** Oh, I wanted to ask you just a couple
 14:35:32 **21** questions, totally changing gears now.
 14:35:34 **22** **A.** Okay.
 14:35:35 **23** **Q.** But we had mentioned an individual a couple
 14:35:36 **24** of times today by the name of Ryan Barrows.
 14:35:40 **25** **A.** Yes.
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14:35:41 **1** **Q.** Okay. And so I want to kind of go through
 14:35:43 **2** time.
 14:35:44 **3** Do you know when Ryan Barrows started
 14:35:46 **4** working with you, or at the company?
 14:35:50 **5** **A.** Only speculatively. He was only around I
 14:35:52 **6** think for a couple few years, and so if I were to
 14:35:55 **7** guess it was in the 2005/2006 timeframe, but I don't
 14:36:00 **8** know definitively.
 14:36:00 **9** **Q.** That's, you know, from a lot of the
 14:36:01 **10** documents I've been noticing, that's about the
 14:36:03 **11** timeframe, 2005, over that kind of period.
 14:36:05 **12** **A.** Okay.
 14:36:05 **13** **Q.** And I was wondering, do you have any memory
 14:36:07 **14** of Ryan Barrows being around for the 750's development
 14:36:11 **15** cycle, or was that way too early for him?
 14:36:14 **16** **A.** I believe that was too early for him.
 14:36:16 **17** **Q.** Okay. And so you --
 14:36:18 **18** It also seems, from the timeframe you've
 14:36:20 **19** given me, Ryan Barrows never worked in 3M.
 14:36:23 **20** **A.** Correct.
 14:36:23 **21** **Q.** Okay. Now let me get an understanding in
 14:36:26 **22** those years that he was working with you. What was
 14:36:30 **23** his job description, what did he do for you?
 14:36:33 **24** **A.** He would have been a mechanical engi -- a
 14:36:35 **25** design engineer or a senior design engineer and would
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14:36:38 **1** have worked on various product development efforts or
 14:36:40 **2** also supporting existing products in the general
 14:36:43 **3** engineering function.
 14:36:45 **4** **Q.** Okay. And that general engineering
 14:36:47 **5** function, that could be things -- that could include
 14:36:50 **6** coming up with design concepts, things like that?
 14:36:53 **7** Those are engineering-type jobs?
 14:36:55 **8** **A.** Yep.
 14:36:55 **9** **Q.** And another one, I noticed there was some
 14:36:58 **10** discussions about filters and plotting blower curves
 14:37:00 **11** and those sorts of things. Creating that kind of
 14:37:02 **12** technical document, those are other things that Ryan
 14:37:05 **13** Barrows may have been involved in?
 14:37:07 **14** **A.** Yes.
 14:37:08 **15** **Q.** What about things like product -- like --
 14:37:11 **16** Okay. Let me try to back up.
 14:37:13 **17** When we talk about those blower curves, are
 14:37:15 **18** those generated in a computer model, or are those done
 14:37:18 **19** with the actual machine?
 14:37:19 **20** **A.** Actual machine.
 14:37:20 **21** **Q.** Okay. So Ryan Barrows is somebody who is
 14:37:23 **22** qualified to do some actual hands-on testing of the
 14:37:25 **23** device.
 14:37:26 **24** **A.** Correct.
 14:37:26 **25** **Q.** Okay. Now in your job did you ever find
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14:37:29 **1** yourself, in your years -- and I want to talk about
 14:37:32 **2** from 750 forward, you know, for most -- which has been
 14:37:36 **3** most of your career.
 14:37:37 **4** Were you ever in a situation where you're
 14:37:39 **5** putting hands on the device to do testing that's
 14:37:41 **6** recorded, or is that only something that those blower
 14:37:44 **7** engineers did?
 14:37:47 **8** **A.** I would say I would be hands on to build
 14:37:49 **9** devices, prototypes and stuff like that. I would do
 14:37:52 **10** more simplified testing such as, you know, temperature
 14:37:55 **11** measurements with thermocouples and stuff like that,
 14:37:57 **12** but I never did blower curves myself. I never ran the
 14:38:01 **13** heat flux or ASTM test bed or anything like that. So
 14:38:05 **14** I did some basic level of testing, but not to the
 14:38:08 **15** extent that some of the other engineers would do.
 14:38:10 **16** **Q.** Okay. In general were you happy with Mr.
 14:38:11 **17** Barrows' work?
 14:38:13 **18** **A.** Oh, gosh yes.
 14:38:14 **19** **Q.** Okay. In other words, when he left the
 14:38:16 **20** company, he didn't leave it for a non-amicable reason,
 14:38:21 **21** put it that way.
 14:38:22 **22** **A.** Correct.
 14:38:22 **23** **Q.** Do you know what I mean?
 14:38:24 **24** So when he parted ways I take it he went
 14:38:27 **25** with your blessing and recommendation?

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14:38:28 **1** **A.** Not with my blessing because I didn't want
 14:38:30 **2** him to leave, but he would have gotten my
 14:38:32 **3** whole-hearted recommendation, yes.
 14:38:34 **4** **Q.** Sure. Okay.
 14:38:35 **5** **A.** Okay.
 14:38:35 **6** MR. BANKSTON: I think that's just about it
 14:38:37 **7** for us today. You got any questions?
 14:38:41 **8** BY MR. BANKSTON:
 14:38:42 **9** **Q.** Oh. Yeah. So I want talk just a minute
 14:38:45 **10** again about RespirTech.
 14:38:46 **11** **A.** Umm-hmm.
 14:38:46 **12** **Q.** Okay. And I noticed that some 3M people
 14:38:49 **13** ended up at RespirTech.
 14:38:50 **14** **A.** Correct.
 14:38:50 **15** **Q.** Did they all go at once, or was that a slow,
 14:38:53 **16** iterative process?
 14:38:54 **17** **A.** It was a slow, iterative process.
 14:38:56 **18** **Q.** Okay. So I want to talk about specifically
 14:38:57 **19** with you. How did you get that job offer?
 14:38:59 **20** **A.** I knew Bob Buehler had gone to work there.
 14:39:04 **21** I knew they didn't have a real strong product
 14:39:07 **22** development group, and so I kind of kept my ear to the
 14:39:10 **23** ground for them looking to fill engineering positions,
 14:39:12 **24** and actually applied to a job through LinkedIn.
 14:39:15 **25** **Q.** Okay. Your departure from 3M, was it

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14:39:17 **1** voluntary?
 14:39:18 **2** **A.** Oh yes.
 14:39:19 **3** **Q.** Okay. So basically if I think I understand
 14:39:22 **4** the situation right, before you left for RespirTech
 14:39:24 **5** Mr. Buehler got involved in the management of
 14:39:27 **6** RespirTech.
 14:39:28 **7** **A.** Correct.
 14:39:28 **8** **Q.** And he knew you from his time at the company
 14:39:30 **9** in patient warming.
 14:39:31 **10** **A.** Correct.
 14:39:32 **11** **Q.** And so it was his invitation that got you
 14:39:34 **12** there.
 14:39:35 **13** **A.** Technically, no, because we have non-recruit
 14:39:39 **14** -- non --
 14:39:40 **15** **Q.** Ahh.
 14:39:41 **16** **A.** So I went there because I knew he was there,
 14:39:43 **17** but it was not at his beckoning of me.
 14:39:47 **18** **Q.** Right. It wasn't --
 14:39:47 **19** **A.** He played a role in me going, though.
 14:39:50 **20** **Q.** It wasn't like Mr. Buehler could check a box
 14:39:53 **21** that says, he's coming. You had to prove yourself to
 14:39:55 **22** RespirTech.
 14:39:55 **23** **A.** Yeah. I mean, I had to apply to an open
 14:39:56 **24** position and interview and prove myself. But I'm sure
 14:39:59 **25** Bob's opinion of me swayed the decision-making

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14:40:02 **1** process.
 14:40:02 **2** **Q.** Sure. Sure.
 14:40:04 **3** And do you remember about what time Mr.
 14:40:06 **4** Hansen came over to the company?
 14:40:08 **5** **A.** It would be purely speculative. I'm
 14:40:10 **6** guessing about 18 months ago.
 14:40:12 **7** **Q.** Are y'all still working sort of side by
 14:40:14 **8** side, are y'all both doing the same, like in
 14:40:15 **9** design stuff?
 14:40:16 **10** **A.** No. He's more of a clinical position, so
 14:40:18 **11** we'll interact on certain things, but no, he's not
 14:40:21 **12** part of my reporting structure and he's not part of
 14:40:23 **13** product development like I am.
 14:40:25 **14** **Q.** Okay.
 14:40:25 **15** **A.** We're a small enough company where, you
 14:40:27 **16** know, a lot of us interact on a daily basis.
 14:40:29 **17** **Q.** Sure.
 14:40:29 **18** MR. BANKSTON: All right. Mr. Zgoda, thank
 14:40:31 **19** you for your time today.
 14:40:32 **20** THE WITNESS: Thank you.
 14:41:09 **21** (Deposition concluded at 2:41 p.m.)
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C E R T I F I C A T E

I, Debby J. Campeau, hereby certify that I am qualified as a verbatim shorthand reporter; that I took in stenographic shorthand the testimony of KARL D. ZGODA at the time and place aforesaid; and that the foregoing transcript consisting of 236 pages is a true and correct, full and complete transcription of said shorthand notes, to the best of my ability.

Dated at Lino Lakes, Minnesota, this 28th day of February, 2017.

DEBBY J. CAMPEAU
Notary Public

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S I G N A T U R E P A G E

I, KARL D. ZGODA, the deponent, hereby certify that I have read the foregoing transcript, consisting of 236 pages, and that said transcript is a true and correct, full and complete transcription of my deposition, except per the attached corrections, if any.

PAGE	LINE	CHANGE/REASON FOR CHANGE
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20	Date	Signature of Witness
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WITNESS MY HAND AND SEAL this _____
day of _____, 2017.

(DJC) _____

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